Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should the Sixth Circuit have followed the holdings of the Ninth and Eleventh Circuits which had recognized that Congress had completely abrogated Eleventh Amendment Immunity by adopting Title II of the Americans with Disabilities Act (ADA) and allowing States to be held liable for failing to comply with handicap accessibility requirements?

2. Is absolute judicial immunity applicable to sentencing orders that result in an individual suffering disparate treatment in violation of the Constitution ~~and~~/or statutory law while in confinement?

PARTIES TO THE PROCEEDING

Petitioners are Rachel Haas, Carol Haas, and Richard Haas. Petitioners are not corporate entities.

Respondent is the State of Ohio. Quest Recovery Services, Inc. and the City of Canton were defendants in the proceedings below but are not involved in the instant appeal.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not reported and has been included in the Appendix at Appendix A at *App. 1a.*

The Opinion of the District Court for the Northern District of Ohio has been published 388 F. Supp.2d 797 and is included herewith in Appendix B at *App. 14b.*

JURISDICTION

The United Sates Court of Appeals for the Sixth Circuit issued its Opinion on March 27, 2006. *Appendix A, p. 1a.* This Petition for Writ of Certiorari is filed within ninety (90) days of the issuance of that decision. This Court's jurisdiction is invoked pursuant to *28 U.S.C. § § 1254(1) and 2106.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Americans with Disabilities Act (Title II)
42 U.S.C. § 12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, Rachel Haas, is seeking injunctive relief and damages as a result of the refusal of Respondent, State of Ohio, to comply with Title II of the Americans with Disabilities Act (ADA) with regard to state sponsored overnight drug and alcohol treatment programs. Her parents, Petitioners Carol and Richard Haas, have raised claims for loss of consortium.

B. Course of Proceedings.

Petitioners commenced this action against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), on March 1, 2004. *R. 1, Complaint; Appendix D at p. 13d.* The Complaint raised separate claims for Handicap Discrimination (Count I), Rehabilitation Act Violations (Count II), Civil Rights

Violations (Count III), Negligence/Intentional Tort (Count IV), Infliction of Emotional Distress (Count V), and Loss of Consortium (Count VI). *Id.* It was alleged *inter alia* that Petitioner, Rachel Haas, had suffered serious injury, humiliation, and distress while attending a six day non-handicap equipped driver intervention program (DIP) in Massillon, Ohio.[1] Quest had operated the program in a building owned by Respondent, State of Ohio. Participants were required to stay overnight. Both Defendants submitted Answers denying liability. No challenges were raised to federal jurisdiction under *28 U.S.C. §1331* (Federal Question) and *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

On May 24, 2004, the City filed a Motion to Dismiss pursuant to *Fed.R.Civ.P. 12(B)(6). R. 14.* The municipality argued that only the State government had been involved with Petitioner's conviction, sentencing, and punishment for driving while intoxicated through the Canton Municipal Court. Having no reason to dispute the numerous authorities cited therein, Petitioners voluntarily agreed to dismiss all claims against the City on May 27, 2004. *R. 17, Joint Notice of Partial Dismissal.*

At the same time, Petitioners submitted their Unopposed Motion for Leave to File First Amended Complaint. *R. 18.*. This request was granted on June 9, 2004, *R. 19, Marginal Order*, and the revised pleading was filed on June 11, 2004, *R. 25, First Amended Complaint; Appendix E, p. 44e.* Respondent, State of Ohio (hereinafter the "State"), was joined to the proceedings therein. The theories of recovery

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[1] Petitioner had been permanently crippled in an ATV/truck accident. She was convicted of driving while intoxicated in connection with the incident and ordered, as part of her sentence, to complete the six day Driver Intervention Program as an alternative to incarceration.

remained the same, except the claim for civil rights violations under *42 U.S.C. §1983* (Count III) were abandoned. Both Quest and the State again submitted Answers denying liability. *R. 26 & 35.*

On August 10, 2004, the State moved for dismissal pursuant to *Fed.R.Civ.P. 12(b)(6)* (hereinafter "Defendant's Motion"). *R. 36, Motion to Dismiss.* It was argued therein that judgment should be granted under *Fed.R.Civ.P. 12(b)(1) and (6)* because (1) a valid claim for relief had not been stated and (2) Eleventh Amendment immunity barred any recovery. Plaintiffs' timely response was submitted on August 27, 2004. The State's Reply followed on September 13, 2004.

C. Disposition Below.

In a ruling dated September 20, 2004, Judge James S. Gwin granted the State's Motion only in part. *Order, Appendix C, p. 15c.* In his opinion, he concluded that the Eleventh Amendment had been properly abrogated for purposes of the Rehabilitation Act but not the ADA. *R. 47, Opinion and Memorandum, pp. 4-11; Appendix C, pp. 18c-25c.* It was further determined that while a claim for "direct discrimination" could not be maintained, the pleading did allege a potentially viable *Johnson* claim against the State as the owner of the building and grounds where the alcohol treatment program was conducted. *Id., pp. 14-15; Appendix C, pp. 28c-29c.* Following this ruling, the parties proceeded to prepare for trial.

Eventually, Petitioners reached a settlement agreement with Quest which resulted in a dismissal of all claims against the company on December 14, 2004. *R. 86, Notice of Dismissal.* Shortly before trial, Petitioners and the State entered their own partial settlement. By stipulation, all

pending claims were dismissed. *R. 90, Order.*[2] The parties' written release specifically provided that Petitioners retained their right to appeal the dismissal of their claim against the State under the ADA.

Petitioners commenced a timely appeal to the Sixth Circuit. The Court's opinion was issued on March 27, 2006. *Appendix A, appended hereto.* Oddly, it was concluded that:

> The district court correctly found that [Petitioners] did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability upon the State of Ohio.

Sixth Circuit Opinion, p. 9; Appendix A, p. 9a. Actually, the District Judge had not found that the pleadings were defective with regard to the claim that the State could be liable in accordance with *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), due to its ownership of a public building that was not handicap compliant. *District Court Opinion, p. 14; Appendix C, p. 28c.* No explanation was provided by the Sixth Circuit for how he erred in this regard.

The appellate court did find, as the District Judge had, that both the Eleventh Amendment and absolute judicial immunity precluded the State from being held liable under Title II. *Sixth Circuit Opinion, pp. 6-13; Appendix A, pp. 6a-13a.* Petitioners now seek further review in the Supreme Court of the United States.

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[2] This entry was supplanted by a further Order dated January 28, 2005. *R. 94, Order.*

ARGUMENT FOR GRANTING WRIT

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the Ninth and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

A. The Conflict Among the Circuits.

Issuance of the Writ in this instance would permit this Court to resolve the question that was left unanswered in *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L.Ed.2d 820 (2004). The majority held that the Eleventh Amendment was not a bar to a Title II ADA claim "implicating the fundamental right of access to the courts". *Id.*, 541 U.S. at 533-534. Ever since the issuance of this decision, the federal judiciary has struggled with the issue of whether States can be held liable for other forms of handicap discrimination that – although equally reprehensible – do not involve any allegations of a denial of access to the courts. Petitioners' allegation that the State of Ohio failed to provide handicap accessible housing for participants in a court mandated DIP is one such claim.

The federal appellate courts are plainly divided on this profoundly important question. In *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004), the Ninth Circuit held that Congress had completely abrogated Eleventh Amendment immunity with regard to all types of Title II ADA claims.[3] Since no exceptions or limitations were established

[3] This Conclusion was reached even after this Court had directed the Ninth Circuit to consider the implications of the recent ruling in *Lane*, 541 U.S. 509. *Columbia Riv. Corr. Inst.*

for this broad rule, it is evident that the instant Petitioners' claim would have been viable in that jurisdiction. In the proceedings below District Judge Gwin dismissed *Phiffer* on the grounds that "the Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court ***." *District Court Order, p. 9; Appendix C, p. 23c.* As the Sixth Circuit later confirmed, the decision that had been rendered in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), allowed Title II claims to be pursued against the States only in the fortuitous instance that the disabled claimant had been denied some sort of "due process" right. *Sixth Circuit Opinion, p. 11; Appendix A, p. 11a.*

The Ninth Circuit's more expansive view of Congressional authority is also shared by the Eleventh Circuit. In *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005), it was held that a state university could be sued under Title II of the ADA for failing to provide sign language interpreters and necessary aides to deaf students. Such a claim would have been subject to a quick dismissal in the Sixth Circuit because only those protected classes "entitled to a heightened level of constitutional scrutiny" can avoid Eleventh Amendment immunity. *Sixth Circuit Opinion, p. 12; Appendix A, p. 12a.* The plaintiffs in *Association for Disabled Americans* were allowed to proceed, on the other hand, with a discrimination claim based solely upon their right to access to educational services. *Id.*, 405 F.3d at 957-958. As the Eleventh Circuit openly acknowledged, "classifications relating to education only involve rational basis review", *Id.* at 957, which is precisely what led the Sixth Circuit to conclude that the handicap cannot surmount the Eleventh Amendment. *Sixth*

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v. Phiffer, 541 U.S. 1059, 124 S. Ct. 2386, 158 L.Ed.2d 960 (2004). A second request for *certiorari* was then denied. *Columbia Riv. Corr. Inst. v. Phiffer*, ____ U.S. ___, 126 S. Ct. 1140, 163 L.Ed.2d 999.

Circuit Opinion, p. 12; Appendix A, p. 12a.

B. Abrogation of Eleventh Amendment Immunity.

Unlike the Ninth and Eleventh Circuits, the Sixth Circuit has failed to pay sufficient respect to Congress' entitlement under Section 5 of the Fourteenth Amendment to override the Eleventh Amendment and redress discriminatory practices being perpetrated by the States. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Broad authority has been conferred to enforce the rights codified in the historic Amendment. *Ex parte Commonwealth of Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1879); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732, 102 S.Ct. 3331, 3340, 73 L.Ed.2d 1090 (1982). "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624 (1997), quoting *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724, 16 L.Ed.2d 828 (1966). In determining whether Eleventh Amendment immunity has been overcome, a Court must ask whether (1) the legislature has "unequivocally" expressed its intention to do so and (2) has acted pursuant to a valid exercise of power. *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 55, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996).

There can be no doubt that the first question must be answered in the affirmative in this instance. Congress has specifically directed in the ADA that:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of

> competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. §12202. The first requirement for overriding sovereign immunity has thus been satisfied. *Board of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 363-364, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001) (examining Title I of the ADA).

The pivotal question therefore becomes whether Title II of the ADA has been enacted pursuant to the authority conferred by Section 5 of the Fourteenth Amendment. In order to prevent improper Congressional expansion of substantive rights, this Court has held that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne,* 521 U.S. at 520. Little doubt can exist over the harm that the legislature was attempting to rectify through the ADA. In no uncertain terms, the purpose of the enactment has been identified as:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards

established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. [emphasis added]

42 U.S.C. § 12101(b). In accordance with *Boerne*, 521 U.S. at 520, the legislation will be valid under Section 5 of the Fourteenth Amendment so long as there is "a congruence and proportionality" in the remedies that Congress has devised to combat discrimination against the disabled.

C. Shifting Sixth Circuit Standards.

1. Due Process Only.

According to the Sixth Circuit, the decision in *Popovich*, 276 F.3d 808, held "that the Eleventh Amendment barred claims under Title II of the ADA based upon the Equal Protection Clause but did not bar such claims sounding in due process." *Sixth Circuit Opinion, p. 11; Appendix A, p. 11a.* The problem for the Court was, however, that this reasoning proved to be at odds with the subsequent decision that was rendered in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). In that instance, a male state employee sought damages and other relief as a result of alleged violations of the Family Medical Leave Act (FMLA), *29 U.S.C. §1612.* The only constitutional provisions that were identified in Chief Justice Rehnquist's majority opinion that could authorize legislative abrogation of the Eleventh Amendment were the "equal protection" requirements of Section 1 and the enforcement mechanisms of Section 5 of the Fourteenth Amendment. *Id.,* 538 U.S. at 727.

The FMLA's objective of rectifying "gender-based discrimination in the workplace", *Id.*, at 728, plainly was not based upon principles of "due process". As later observed in *Lane*, 124 S.Ct. at 1986, the *Hibbs* court did not suggest that an actual violation of Section 1 of the Fourteenth Amendment had transpired.[4] To the contrary, the Supreme Court emphasized again that Section 5 permits Congress to regulate "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs*, 538 U.S. at 737, quoting *Kimel*, 528 U.S. at 81. This ruling thus confirms that Congress may exercise its Section 5 authority to adopt legislation imposing purely "equal protection" type requirements upon the states.

2. Protected Classes Only.

Rather than adopting the views of the Ninth and Eleventh Circuits, the Sixth Circuit responded to the *Hibbs* dilemma by fashioning a new exception to its previous "due process only" rule. Congress could abrogate Eleventh Amendment immunity with regard to pure Equal Protection type claims of discrimination so long as the plaintiff belonged to one of the classes of individuals "entitled to a heightened level of constitutional scrutiny". *Sixth Circuit Opinion, p. 12; Appendix A, p. 12a.* This artificial demarcation allowed the Court to explain why the male employee in *Hibbs* was entitled to pursue a gender-based Title II cause of action while even the severely disabled may not. This logic was still directly at odds

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[4] The majority opinion does note that in accordance with *Craig v. Boren*, 429 U.S. 190, 197-199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), statutory classifications based on sex are subject to heightened scrutiny. *Hibbs*, 538 U.S. at 728-729. There is no indication in the opinion, however, that the Court was prepared to hold that the state's leave policy failed to pass muster under traditional Fourteenth Amendment requirements.

with *Association for Disabled Americans*, 405 F.3d at 957, where it had been recognized that the plaintiffs' claim involved only the right of access to education which entails "rational basis review under the Equal Protection Clause". Although both Petitioners and the State had addressed the Eleventh Circuit's Opinion at length in their Brief and Reply, the Sixth Circuit declined to discuss *Association for Disabled Americans* in the Opinion that was issued. *Appendix A, appended hereto.*

Just as in *Phiffer* and *Association for Disabled Americans*, important societal interests are certainly implicated in the instant action. State supported alcohol and drug rehabilitation centers plainly serve a critical function in combating chemical addictions, returning workers to the work force, preserving families, and reducing crime. Where, as here, overnight facilities are provided, the participant's most basic rights to accessible eating areas, restrooms, and living quarters are also implicated. Petitioner, Rachel Haas, has asked only that the State of Ohio ensure that disabled individuals be allowed to enjoy the same access to and participation in the governmentally subsidized Driver Intervention Programs as her non-disabled counterparts. The instant action does indeed raise issues of societal importance that are equal to the concerns for teaching aids and equipment that were examined in *Association for Disabled Americans*, 405 F.3d 954.

It should make no difference that this Court has not held that the disabled are entitled to heightened protection under the Fourteenth Amendment. If that were the case, Petitioner would have been able to seek relief for the disregard of her constitutional rights under *42 U.S.C. §1983* and would not need the benefit of the ADA. Even though the State's wrongdoing in this instance may not rise to the level of constitutional violation, numerous precedents have recognized that the legislature is not limited to prohibiting that which the equal protection clause already forbids. *Boerne*, 521 U.S. at

518; *Kimel,* 528 U.S. at 81.

Nothing in Section 5 of the Fourteenth Amendment suggests that the scope of congressional authority to enforce the ideals of equal protection hinges upon whether the individuals to be protected have received a "suspect class" designation from the courts. Judicial equal protection standards have been fashioned largely to fill the voids that the legislature has not yet addressed. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-440, 105 S.Ct. 3249, 3254, 87 L.E.2d 313 (1985). The rational basis test has been imposed not as a means of establishing areas of state supremacy, but in recognition that the courts will defer to the legislative branch except when special classes of individuals are involved. See *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175-176, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.E.2d 511 (1976). Nor do these standards' "heightened scrutiny" serve to designate when social issues are "important", as they depend more heavily upon whether the groups to be protected have historically suffered from discrimination and political powerlessness. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-33, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976). Even after emphasizing the critical role that public education plays, this Court refused to extend "suspect" class status to impoverished school children and explained that:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social

and economic legislation. ***

Rodriguez, 411 U.S. at 35. The mere fact that a claim of disparate treatment would only be subject to a "rational basis" test under an equal protection analysis should thus have no relevance to the entirely different question of whether legislation is "congruent and proportional" for Eleventh Amendment purposes. [5] The Opinions of the Ninth and Eleventh Circuits thus represent the better reasoned views which are consistent with established precedent.

D. Sufficiency of the Amended Complaint.

Brief mention must also be made of the Sixth Circuit's remark that: "The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability on the State of Ohio." *Sixth Circuit Opinion, p. 9; Appendix A, p. 9a.* As previously noted, District Judge Gwin had reached the opposite conclusion. *District Court Opinion and Memorandum, p. 14; Appendix C, p. 28c.* Contrary to the appellate court's finding, this separate avenue

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[5] It would certainly be paradoxical if equal protection standards that have their origin in the respect that is due to legislative bodies were employed to curtail Congressional attempts to abrogate the Eleventh Amendment. Advocates of an expansive view of the Eleventh Amendment maintain that Congress cannot impose anti-discrimination rules against the states where no suspect classes are involved. See, *e.g. Kilcullen v. New York State Dept. of Transp.*, 33 F.Supp.2d 133, 142-143 (N.D. N.Y. 1999). In effect, Fourteenth Amendment principles that the judiciary has developed to ensure that social legislation is overturned only in the most extreme cases are being applied to the Eleventh Amendment as a means of maximizing state authority at Congress' expense. No logical or historic reason exists for extending "rational basis" and "suspect class" concepts to the immunity analysis.

of relief had nothing to do with Quest and was based entirely upon the State's own failure as a building owner and landlord to provide the handicap accessible facilities that federal law required.

In Paragraph 14 of the First Amended Complaint it was asserted that the building where Petitioner, Rachel Haas, was required to be housed was owned by the State. *First Amended Complaint, p. 3; Appendix E, p. 46e.* Paragraph 38 of the First Amended Complaint further alleged that:

> In the manner aforementioned, the [Municipal] Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

First Amended Complaint, p. 8; Appendix E, p. 51e. After being afforded an opportunity to conduct discovery and retain an expert, Petitioners supplied the District Court with a comprehensive architectural report confirming that the State-owned building failed to comply with a litany of handicap accessibility requirements.[6]

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[6] This duly authenticated report was attached to Plaintiffs' Revised Motion for Partial Summary Judgment on Counts I and II as Exhibit A. The materials were submitted during the summary judgment phase of the proceedings and did not in any sense alter the allegations contained in the First Amended

In *Johnson*, 151 F.3d 564, the Sixth Circuit examined a case in which a disabled plaintiff filed a claim against the city because the second floor of a city-owned radio station building he was required to use in his business was allegedly inaccessible to him. The District Court rejected his Title II claim in part on the grounds that he was leasing the premises from the municipality and was thus solely responsible for providing the accommodations. *Id.*, at 571. Writing for the majority, Judge Boggs explained on appeal that:

> Though it was run by [plaintiff], the station was located in a city building, and operated there rent free. It is clear from the Technical Assistance Manual construing Title II that public entities have a duty to provide accessible facilities even when those facilities are used by contractors. As noted above, the Manual is entitled to substantial deference for this interpretation of Title II. The Technical Assistance Manual gives the specific example of a city-owned building in which the first floor is leased by private businesses. Even though the businesses may be subject to Title III of the ADA (42 U.S.C. §12181 *et seq.*, regarding public accommodations), the city is

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Complaint. Given that this lawsuit is – above all else – a search for the truth, the additional information that has been furnished should be considered in evaluating whether a potentially valid claim for relief has been stated. *American Inter-Fidelity Exchange v. American Re-Insurance Co.*, 17 F.3d 1018, 1021-1022 (7th Cir. 1994); *Daush v. Rykes*, 52 F.3d 1425, 1427 fn. 3 (7th Cir. 1994). Turning a blind eye towards the facts that have been developed during the summary judgment proceedings would hardly serve the interests of justice.

> simultaneously subject to Title II because it is a landlord. TITLE II TECHNICAL ASSISTANCE MANUAL §1.3000. This section applies here: the city definitely is a landlord, required by Title II to reasonably accommodate the disabled public. [emphasis added]

Id., at 571-572. Quite clearly, the State could not circumvent its obligations under Title II of the ADA with a sublease of the premises to Quest. The State's responsibility for ensuring compliance with the accessibility requirements is even more apparent in this instance in light of the municipal court's practice of directing handicapped individuals, such as Petitioner, to be housed in the government owned building.

The First Amended Complaint – which must be accepted as true for purposes of a Motion to Dismiss – specifically charge that the building at issue was not handicap accessible. *R. 25, First Amended Complaint, pp. 8-9; Appendix E, pp. 51e-52e.* These allegations were later substantiated during the course of the proceedings below.[7] District Judge Gwin correctly recognized that Petitioners had sufficiently alleged a potentially meritorious claim against the State for failing to comply with federal handicap accessibility requirements as the owner and landlord of the Smith House. *R. 47, Opinion & Memorandum, p. 14, apx. 60.* Since the Eleventh Amendment had been properly abrogated by Congress, Petitioners should have been allowed to proceed with their Title II ADA claim against the State.

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[7] As noted earlier, the specific regulations that should have been, but were not, followed were identified in the report submitted by Plaintiffs' architectural expert. *R. 56, Plaintiffs' Revised Motion for Partial Summary Judgment on Counts I and II, Exhibit A.*

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order.

The Sixth Circuit also held that Petitioners' entire cause of action was barred by the doctrine of absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix A, pp. 7a-8a.* The panel's reasoning was that Petitioner Rachel Haas' claim that she had been ordered to be confined in a non-handicap accessible facility was really "an attempt to sue the municipal court judge." *Id., at 7; Appendix A, p. 7a.* Since the Judge "clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing [Petitioner] to two six-day driver intervention programs" no claim could be pursued against the State. *Id., pp. 7-8; Appendix A, pp. 7a-8a.*

If allowed to stand, the implications of this ruling will be profound. This Court recognized some time ago that handicapped inmates are entitled to pursue otherwise valid Title II ADA claims based on disparate treatment suffered in connection with their sentences and confinement. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998). Since all such prisoners are, by necessity, subject to a judge's sentencing order, no such claim can now be pursued in the Sixth Circuit. Ordering a disabled individual to be confined in a non-handicap compliant facility is now protected by absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix A, pp. 7a-8a.*

Even more troubling, the appellate court's short-sighted ruling paves the way for the creation for special prisons for blacks, Hispanics, Arabs, and other minorities. So long as a

judge has ordered the individual to be confined in the segregated facility "absolute judicial immunity" will preclude even a constitutional claim from being filed under 42 U.S.C. §1983 or any other provision of law.[8] Even where (as in Petitioners' case) these minority-only facilities subject their occupants to harsher and more onerous treatment than the general prison population, no redress will be available

The Sixth Circuit's overly broad application of judicial immunity is disturbing. As established in *Johnson*, 151 F.3d at 571-572, the State was required to ensure, as a landlord, that its building complied with federal regulations designed to protect the disabled. This was not done and Petitioner suffered a nightmarish experience over six days that her non-disabled counterparts were not required to endure. Immunizing the State from the liability that Congress has elected to impose through Title II on the grounds that Petitioner was subject at the time to a valid court order is both illogical and antithetical to the noble objectives of the ADA.

The lower courts' immunity analysis fails to account for the critical distinction between judicial and ministerial acts. Petitioner has never challenged the length, terms, and conditions of the sentence that Municipal Judge Kubilus imposed upon her. Her position is that Title II of the ADA requires that she be allowed to fully participate in and benefit from the drug/alcohol treatment programs that were being provided to non-handicapped DUI offenders as an alternative to incarceration. *42 U.S.C. §12132.* Judicial immunity is

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[8] When judicial immunity applies, not even constitutional rights can be vindicated. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288 (1967); *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L.Ed.2d 9 (1991). Great care must therefore be taken in defining the contours of this powerful privilege.

unavailable for ministerial acts performed during the course of a legal proceeding, even when undertaken by a judge. *Ex parte Commonwealth of Virginia,* 100 U.S. at 348; *Forrester v. White,* 484 U.S. 219, 227-229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133-1135 (9th Cir. 2001). The decision of whether or not to offer a handicap accessible DIP facility to disabled offenders could have been made by a court administrator, departmental chief, or some other non-judicial state officer or employee. Indeed, there is no reason whatsoever to believe that Municipal Judge Kubilus had intended for Petitioner to be confined in a non-compliant facility. No logical reason exists for cloaking the State's refusal to comply with Title II with absolute judicial immunity.

CONCLUSION

The Sixth Circuit's Opinion in the proceedings below unjustifiably curtails Congressional authority to protect the rights of the disabled. As properly recognized in the conflicting Opinions of the Ninth and Eleventh Circuits, Title II of the ADA properly abrogates the Eleventh Amendment where important rights sounding in equal protection are at stake. Petitioner's claim that she suffered disparate treatment by being housed in a non-handicap accessible DIP facility falls squarely within the brand of insensitive and unacceptable conduct that the legislature was attempting to eradicate. She should not be denied relief simply because she cannot allege a due process violation and does not fall within one of the protected classes that is entitled to heightened judicial scrutiny. Finally, immunizing the State from its dereliction simply because a judge's order was involved will allow easy circumvention of Title II throughout the penal system and should be forcefully rejected. For these reasons, a Writ of Certiorari should issue with regard to the Sixth Circuit's ill-advised decision.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS,	)	
CAROL HAAS, and	)	
RICHARD HAAS,	)	
	)	
Plaintiffs-Appellants,	)	
	)	**ON APPEAL** FROM THE
v.	)	UNTIED STATES
	)	DISTRICT COURT FOR
QUEST RECOVERY	)	THE NORTHERN
SERVICES, INC. and	)	DISTRICT OF OHIO
STATE OF OHIO,	)	
	)	**OPINION**
Defendants-Appellees.	)	

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge*

AVERN COHN, District Judge. This is a case under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc. (Quest) and the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment based upon her

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The complaint as originally filed named the City of Canton, Ohio as a defendant. Plaintiffs, however, dismissed all claims against the City and amended the complaint to name the State of Ohio as a party defendant.

physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. The Haases appeal the district court's dismissal of their claim against the State of Ohio under Title II of the ADA, 42 U.S.C. §12132. We affirm.

I. FACTUAL BACKGROUND[2]

On September 19, 2002, Rachel Haas (Haas) was operating an all-terrain vehicle in Louisville, Ohio, while intoxicated. While crossing a road, Haas was hit by a truck and suffered serious injuries, including fractures to her pelvis and arms, a partially severed hand, a crushed leg, and other internal injuries. She was hospitalized for several weeks. During the course of her treatment, her left leg was amputated above the knee, she received a prosthetic right elbow, and a metal rod was placed in her right arm. She was prescribed pain medication and a course of physical therapy upon her release from the hospital.

The local prosecutor charged Haas with driving under the influence of alcohol. OHIO REV. CODE §4511.19(A). She pleaded guilty in the Canton, Ohio, municipal court on February 18, 2003. Prior to her sentencing, she provided the judge with a letter from her physical therapist, stating that rehabilitation would take three to six months and that "[a]ny

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[2] Because the district court granted the State of Ohio's motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the factual background is taken from the first amended complaint. *Benzon v. Morgan Stanley Distrib., Inc.*, 420 F.3d 598, 609 n.5 (6th Cir. 2005) (noting that this Court accepts as true all of plaintiff's as well-pleaded allegations when we review a grant of a motion to dismiss for failure to state a claim.)

disruption of this rehabilitation...would be very detrimental to her progress." The municipal court judge sentenced Haas to 36 days of house arrest and required her to participate in two six-day driver intervention programs at Quest's Massillon, Ohio, facility. The State of Ohio owned the building housing Quest's facility and leased it indirectly to Quest.

Haas, who required a wheelchair, reported for her first six-day stay at Quest's facility on March 13, 2003. The first amended complaint describes her experience as follows:

> Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was non and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.
>
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>
> Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not

> handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself...

In addition to this situation, Haas allegedly fell down three flights of stairs while in the facility, displacing the rod in her arm. When her physical therapist wrote another letter indicating that she was not cleared for stair climbing, she was allowed to take meals in her room, though the complaint state that staff "forgot" to deliver food on several occasions.

Despite a favorable assessment by her counselor, the first amended complaint alleges that the facility's direct "advised her that her attitude had been unacceptable and her completion of the program would not be approved." A hearing was conducted in municipal court on April 4, 2003, which resulted in an order of confinement in the Stark County, Ohio, jail for six days beginning April 7, 2003.

II. PROCEDURAL HISTORY

After completing her sentence without further incident, Haas and her parents filed this lawsuit. The complaint as originally filed listed six counts: (1) handicap discrimination, (2) rehabilitation act violations, (3) civil rights violations, (4) negligence/intentional tort, (5) infliction of emotional distress, and (6) loss of consortium. The Haases abandoned count three (civil rights violation) when they filed the first amended complaint.

The State of Ohio filed a motion to dismiss arguing that Eleventh Amendment immunity barred recovery and, in the alternative, the Haases did not state a valid claim for relief. The district court granted the State's motion in part, ruling that (1) Title II of the ADA dose not abrogate Ohio's Eleventh Amendment immunity to the Haases' ADA claim, (2) Ohio waived its uimminity to the Haases' Rehabilitation Act claim,

and (3) the Haases failed to state a claim for direct discrimination against the State of Ohio.

On December 28, 2004, the district court entered an order of settlement, followed by another order on January 28, 2005, which provided "[n]otwithstanding the foregoing [settlement and dismissal], this entry shall have no effect upon Plaintiffs' right to appeal the Order of September 20, 2004 dismissing the Americans with Disabilities Act claims ... on the pleadings." Quest settled the ADA and Rehabilitation Act claims against it for an undisclosed sum. The State of Ohio settled a claim under the Rehabilitation Act premised upon its ownership of the building that housed the Quest facility.

III. ANALYSIS

A. Standard of Review

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Simon v. Pfizer, Inc.*, 398 F.3d 765, 772 (6th Cir. 2005). A motion under Rule 12(b)(6) is granted when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Curie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* The Court does not accept the "bare assertion of legal conclusions," *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995), nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829, F.2d 10, 12 (6th Cir. 1987).

The applicability of the Eleventh Amendment to claims against a state under the ADA is a question of law that we review *de novo*. *Carten v. Kent State Univ.*, 282 F.3d 391, 394 (6th Cir. 2002).

B. Whether the Haases Stated a Claim Under Title II of the ADA

The Haases say that they sufficiently pleaded direct discrimination by the State of Ohio because the Canton, Ohio, municipal court, which is an arm of the Ohio court system, sentenced Rachel to her treatment program and thus caused her to suffer discrimination. Additionally, the Haases premise liability on the State of Ohio's ownership of the building that housed the Quest facility. The State responds that the Haases attempted, but failed, to link any direct action of the State with the actions of Quest, the private facility.

Title II of the ADA provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

To state a claim of disability discrimination under Title II of the ADA,a plaintiff must allege that "(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participating in, being denied the benefits of, or being subjected to discrimination under a program solely because of her disability." *Jones v. city of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003).

The district court found, and the State does not contest, that the Haases satisfied the first and second elements by alleging Rachel Haas was a qualified individual with a diability. On appeal, the Haases argue, as they did before the district court, that liability should be imposed under Title II of

the ADA as a result of the Canton, Ohio municipal court's practice of referring disabled individuals to non-handicap accessible drug and alcohol treatement facilities. Alternatively, the Haases argue that the State should be held liable for failing to ensure that the buildings where these activities were being conducted satisfied handicap accessibility requirements.

The district court astutely observed that the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge. Indeed, the Haases contend on appeal that the "Canton Municipal Couert treated [Rachel] far more severally [sic] than her non-handicapped counterparts." The proper inquiry for this line of argument is whether the Canton Municipal Court judge is protected by judicial immunity.

The Supreme Court has made clear that judicial immunity is overcome only in two sets of circumstances: "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction." *Mireless v. Waco*, 502 U.S. 9, 11-12 (1991). Issuing an order is judicial in nature. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). Thus the Canton Municipal Court judge clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing Haas to two six-day driver intervention programs.

The Haases also argue that "no logical reason exists for cloaking such routine ministerial acts [as ordering a driver intervention program] with absolute judicial immunity." They argue that the order could have been made by a "court administrator, departmental chief, or some other non-judicial state officer or employee." This argument is of no moment, and the district court did not err in finding that the Canton Municipal Court judge has judicial immunity for his sentencing

decision.

With respect to the Haases' position that the State of Ohio should be held liable under Title II of the ADA based on its ownership of the building housing the Quest facility, they primarily rely upon *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). In *Johnson*, this Court held that a public entity that leases or rents its facilities to non-public entities is subject to Title II of the ADA because it is a landlord. *Id.* at 571-72. Here, the district court found that the State of Ohio is subject to liability as a landlord because an agency of the State, the Ohio Department of Alcohol and Drug Addiction Services, leased the property housing the Quest facility to the Stark County Alcohol and Drug Addition Services Board which, in turn, subleased the facility to Quest. Thus, the remaining question is whether Quest is a public entity and whether the State of Ohio is thereby subject to direct liability.

The *Johnson* court enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state. Those factors include:

> (1) Whether theentitey is operated with public funds;
> (2) Whether the entity's employees are considered government employees;
> (3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
> (4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572.

In their first amended ocmplaint, the Haases alleged the following:

> 16. At all times...Quest acted as an agent and/or extension of the State by performing a *quasi*-governmental function under the ultimate supervision, direction, and control of the Court and/or State....
>
> 38. ...The court and/or State further subjected Plaintiff to discrimination by ...ordering her to be confined in a privately operated system [Quest].

The district court correctly found that the Haases did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability on the State of Ohio.

C. Whether the State of Ohio is Entitled to Eleventh Amendment Immunity for the Haases' Claim Under Title II of the ADA

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. It is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal citation omitted). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* Eleventh

Amendment immunity does not however, apply in two circumstances: (1) where a state has waived its immunity from suit in federal court, and (2) where Congress has abrogated the state's immunity. *Thiokol Corp. v. Dep't of Treas., State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). The Haases argue that Congress abrogated the State of Ohio's immunity to claims arising under Title II of the ADA.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment. The most recent Supreme Court case to address Eleventh Amendment Immunity for ADA Title II claims is *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Supreme Court held that Title II of the ADA is a valid exercise of Congress's §5 authority to protect a plaintiff's due process right of access to the courts. *Id.* at 531. The Supreme Court made clear, however, that its holding in *Lane* was expressly limited to the question before it: whether Congress had the power under § 5 of the Fourteenth Amendment to enforce the constitutional right of access to the courts:

> [N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths...

Id. at 530-31. Accordingly, the holding in *Lane* is limited and does not provide us with guidance for this case because the circumstances presented in *Lane* (*i.e.*, access to the courts) are

not present in this case. Thus, we must look to precedent from this circuit to resolve the question before us.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), a state court failed to provide the plaintiff with adequate hearing assistance during a child custody case. We held, in an *en banc* decision, that the Eleventh Amendment barred claims under Title II of the ADA based upon the Equal Protection Clause but did not bar such claims sounding in due process. *Id.* at 812. The Haases condede on appeal, as they emphasized before the district court, that their claims implicate equal protection concerns, not those of due process: "This Court should now take this opportunity to hold that Title II of the ADA has abrogated Eleventh Amendment immunity even with respect to pure claims of disparate treatment that sound solely in equal protection."

Despite our holding in *Popovich* that the Eleventh Amendment bars equal protection claims under Title II of the ADA, the Haases ask us to clarify our ruling in light of the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003). In *Hibbs*, a male state employee sought damages because of alleged violations of the Family Medical Leave Act (FMLA), 29 U.S.C. §2612. *Id.* at 725. The Supreme Court held that Congress intended the FMLA to protect a right guaranteed by the Equal Protection Clause – specifically, the right to be free from gender-based discrimination in the workplace. *Id.* at 728. The Haases say that because the Supreme Court in *Hibbs* determined that Congress validly abrogated Eleventh Amendment immunity based on the principles of equal protection, *Popovich* no longer is persuasive because *Hibbs* suggests that Congress may exercise its §5 authority to adopt legislation imposing purely equal protection-type requirements upon the states. We find this position unavailing, however, because constitutional

standards relating to gender-based discrimination (which is what was at issue in *Hibbs*) are distinguishable from those relating to discrimination of the disabled. Notably, gender-based discrimination is entitled to a heightened level of constitutional scrutiny – one that requires a gender-based classification to serve important governmental objectives and be substantially related to the achievement of those objective. *Id.* at 736. Discrimination on the basis of a characteristic such as a disability, on the other hand, is entitled only to a "rational basis" review. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

In light of the narrow scope of *Lane's* holding, which is limited to Title II ADA claims for the right of access to courts, and in light of this circuit's precedent that establishes that the Eleventh Amendment bars equal protection claims under Title II of the ADA, we find that the district court did not err in holding that the State of Ohio is entitled to Eleventh Amendment immunity for the Haases' claim under Title Ii of the ADA.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is **AFFIRMED.**

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS,	)	
CAROL HAAS, and	)	
RICHARD HAAS,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	**ON APPEAL** FROM THE
	)	UNTIED STATES
QUEST RECOVERY	)	DISTRICT COURT FOR
SERVICES, INC. and	)	THE NORTHERN
STATE OF OHIO,	)	DISTRICT OF OHIO
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Defendants-Appellees.	)	**OPINION**

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge*

AVERN COHN, District Judge. This is a case under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc. (Quest) and the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment based upon her

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physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. The Haases appeal the district court's dismissal of their claim against the State of Ohio under Title II of the ADA, 42 U.S.C. §12132. We affirm.

I. FACTUAL BACKGROUND[2]

On September 19, 2002, Rachel Haas (Haas) was operating an all-terrain vehicle in Louisville, Ohio, while intoxicated. While crossing a road, Haas was hit by a truck and suffered serious injuries, including fractures to her pelvis and arms, a partially severed hand, a crushed leg, and other internal injuries. She was hospitalized for several weeks. During the course of her treatment, her left leg was amputated above the knee, she received a prosthetic right elbow, and a metal rod was placed in her right arm. She was prescribed pain medication and a course of physical therapy upon her release from the hospital.

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disruption of this rehabilitation...would be very detrimental to her progress." The municipal court judge sentenced Haas to 36 days of house arrest and required her to participate in two six-day driver intervention programs at Quest's Massillon, Ohio, facility. The State of Ohio owned the building housing Quest's facility and leased it indirectly to Quest.

Haas, who required a wheelchair, reported for her first six-day stay at Quest's facility on March 13, 2003. The first amended complaint describes her experience as follows:

> Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was non and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.
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Despite a favorable assessment by her counselor, the first amended complaint alleges that the facility's direct "advised her that her attitude had been unacceptable and her completion of the program would not be approved." A hearing was conducted in municipal court on April 4, 2003, which resulted in an order of confinement in the Stark County, Ohio, jail for six days beginning April 7, 2003.

II. PROCEDURAL HISTORY

After completing her sentence without further incident, Haas and her parents filed this lawsuit. The complaint as originally filed listed six counts: (1) handicap discrimination, (2) rehabilitation act violations, (3) civil rights violations, (4) negligence/intentional tort, (5) infliction of emotional distress, and (6) loss of consortium. The Haases abandoned count three (civil rights violation) when they filed the first amended complaint.

The State of Ohio filed a motion to dismiss arguing that Eleventh Amendment immunity barred recovery and, in the alternative, the Haases did not state a valid claim for relief. The district court granted the State's motion in part, ruling that (1) Title II of the ADA dose not abrogate Ohio's Eleventh Amendment immunity to the Haases' ADA claim, (2) Ohio waived its uimminity to the Haases' Rehabilitation Act claim,

and (3) the Haases failed to state a claim for direct discrimination against the State of Ohio.

On December 28, 2004, the district court entered an order of settlement, followed by another order on January 28, 2005, which provided "[n]otwithstanding the foregoing [settlement and dismissal], this entry shall have no effect upon Plaintiffs' right to appeal the Order of September 20, 2004 dismissing the Americans with Disabilities Act claims ... on the pleadings." Quest settled the ADA and Rehabilitation Act claims against it for an undisclosed sum. The State of Ohio settled a claim under the Rehabilitation Act premised upon its ownership of the building that housed the Quest facility.

III. ANALYSIS

A. Standard of Review

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Simon v. Pfizer, Inc.*, 398 F.3d 765, 772 (6th Cir. 2005). A motion under Rule 12(b)(6) is granted when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Curie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* The Court does not accept the "bare assertion of legal conclusions," *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995), nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829, F.2d 10, 12 (6th Cir. 1987).

The applicability of the Eleventh Amendment to claims against a state under the ADA is a question of law that we review *de novo*. *Carten v. Kent State Univ.*, 282 F.3d 391, 394 (6th Cir. 2002).

B. Whether the Haases Stated a Claim Under Title II of the ADA

The Haases say that they sufficiently pleaded direct discrimination by the State of Ohio because the Canton, Ohio, municipal court, which is an arm of the Ohio court system, sentenced Rachel to her treatment program and thus caused her to suffer discrimination. Additionally, the Haases premise liability on the State of Ohio's ownership of the building that housed the Quest facility. The State responds that the Haases attempted, but failed, to link any direct action of the State with the actions of Quest, the private facility.

Title II of the ADA provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

To state a claim of disability discrimination under Title II of the ADA,a plaintiff must allege that "(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participating in, being denied the benefits of, or being subjected to discrimination under a program solely because of her disability." *Jones v. city of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003).

The district court found, and the State does not contest, that the Haases satisfied the first and second elements by alleging Rachel Haas was a qualified individual with a diability. On appeal, the Haases argue, as they did before the district court, that liability should be imposed under Title II of

the ADA as a result of the Canton, Ohio municipal court's practice of referring disabled individuals to non-handicap accessible drug and alcohol treatement facilities. Alternatively, the Haases argue that the State should be held liable for failing to ensure that the buildings where these activities were being conducted satisfied handicap accessibility requirements.

The district court astutely observed that the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge. Indeed, the Haases contend on appeal that the "Canton Municipal Couert treated [Rachel] far more severally [sic] than her non-handicapped counterparts." The proper inquiry for this line of argument is whether the Canton Municipal Court judge is protected by judicial immunity.

The Supreme Court has made clear that judicial immunity is overcome only in two sets of circumstances: "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction." *Mireless v. Waco*, 502 U.S. 9, 11-12 (1991). Issuing an order is judicial in nature. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). Thus the Canton Municipal Court judge clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing Haas to two six-day driver intervention programs.

The Haases also argue that "no logical reason exists for cloaking such routine ministerial acts [as ordering a driver intervention program] with absolute judicial immunity." They argue that the order could have been made by a "court administrator, departmental chief, or some other non-judicial state officer or employee." This argument is of no moment, and the district court did not err in finding that the Canton Municipal Court judge has judicial immunity for his sentencing

decision.

With respect to the Haases' position that the State of Ohio should be held liable under Title II of the ADA based on its ownership of the building housing the Quest facility, they primarily rely upon *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). In *Johnson*, this Court held that a public entity that leases or rents its facilities to non-public entities is subject to Title II of the ADA because it is a landlord. *Id.* at 571-72. Here, the district court found that the State of Ohio is subject to liability as a landlord because an agency of the State, the Ohio Department of Alcohol and Drug Addiction Services, leased the property housing the Quest facility to the Stark County Alcohol and Drug Addition Services Board which, in turn, subleased the facility to Quest. Thus, the remaining question is whether Quest is a public entity and whether the State of Ohio is thereby subject to direct liability.

The *Johnson* court enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state. Those factors include:

> (1) Whether theentitey is operated with public funds;
> (2) Whether the entity's employees are considered government employees;
> (3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
> (4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572.

In their first amended ocmplaint, the Haases alleged the following:

> 16. At all times...Quest acted as an agent and/or extension of the State by performing a *quasi*-governmental function under the ultimate supervision, direction, and control of the Court and/or State....
>
> 38. ...The court and/or State further subjected Plaintiff to discrimination by ...ordering her to be confined in a privately operated system [Quest].

The district court correctly found that the Haases did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability on the State of Ohio.

C. Whether the State of Ohio is Entitled to Eleventh Amendment Immunity for the Haases' Claim Under Title II of the ADA

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. It is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal citation omitted). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* Eleventh

Amendment immunity does not however, apply in two circumstances: (1) where a state has waived its immunity from suit in federal court, and (2) where Congress has abrogated the state's immunity. *Thiokol Corp. v. Dep't of Treas., State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). The Haases argue that Congress abrogated the State of Ohio's immunity to claims arising under Title II of the ADA.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment. The most recent Supreme Court case to address Eleventh Amendment Immunity for ADA Title II claims is *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Supreme Court held that Title II of the ADA is a valid exercise of Congress's §5 authority to protect a plaintiff's due process right of access to the courts. *Id.* at 531. The Supreme Court made clear, however, that its holding in *Lane* was expressly limited to the question before it: whether Congress had the power under § 5 of the Fourteenth Amendment to enforce the constitutional right of access to the courts:

> [N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths…

Id. at 530-31. Accordingly, the holding in *Lane* is limited and does not provide us with guidance for this case because the circumstances presented in *Lane* (*i.e.*, access to the courts) are

not present in this case. Thus, we must look to precedent from this circuit to resolve the question before us.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), a state court failed to provide the plaintiff with adequate hearing assistance during a child custody case. We held, in an *en banc* decision, that the Eleventh Amendment barred claims under Title II of the ADA based upon the Equal Protection Clause but did not bar such claims sounding in due process. *Id.* at 812. The Haases condede on appeal, as they emphasized before the district court, that their claims implicate equal protection concerns, not those of due process: "This Court should now take this opportunity to hold that Title II of the ADA has abrogated Eleventh Amendment immunity even with respect to pure claims of disparate treatment that sound solely in equal protection."

Despite our holding in *Popovich* that the Eleventh Amendment bars equal protection claims under Title II of the ADA, the Haases ask us to clarify our ruling in light of the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003). In *Hibbs*, a male state employee sought damages because of alleged violations of the Family Medical Leave Act (FMLA), 29 U.S.C. §2612. *Id.* at 725. The Supreme Court held that Congress intended the FMLA to protect a right guaranteed by the Equal Protection Clause – specifically, the right to be free from gender-based discrimination in the workplace. *Id.* at 728. The Haases say that because the Supreme Court in *Hibbs* determined that Congress validly abrogated Eleventh Amendment immunity based on the principles of equal protection, *Popovich* no longer is persuasive because *Hibbs* suggests that Congress may exercise its §5 authority to adopt legislation imposing purely equal protection-type requirements upon the states. We find this position unavailing, however, because constitutional

standards relating to gender-based discrimination (which is what was at issue in *Hibbs*) are distinguishable from those relating to discrimination of the disabled. Notably, gender-based discrimination is entitled to a heightened level of constitutional scrutiny – one that requires a gender-based classification to serve important governmental objectives and be substantially related to the achievement of those objective. *Id.* at 736. Discrimination on the basis of a characteristic such as a disability, on the other hand, is entitled only to a "rational basis" review. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

In light of the narrow scope of *Lane's* holding, which is limited to Title II ADA claims for the right of access to courts, and in light of this circuit's precedent that establishes that the Eleventh Amendment bars equal protection claims under Title II of the ADA, we find that the district court did not err in holding that the State of Ohio is entitled to Eleventh Amendment immunity for the Haases' claim under Title Ii of the ADA.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 05-3147

Filed: April 18, 2006

RACHEL HAAS; CAROL HAAS; RICHARD HAAS,)
Plaintiffs-Appellants,

v.

STATE OF OHIO
Defendants-Appellee

MANDATE

Pursuant to the court's disposition that was filed 3/27/06 the mandate for this case hereby issues today.

A True Copy.

COSTS: NONE

Attest:

Filing Fee .....$
Printing.....$

Total .....$

Nancy Barnes
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

RACHEL HAAS, *et al.* Plaintiffs vs. QUEST RECOVERY SERVICES, INC., *et al.* Defendants.	CASE NO. 5:04-CV-409 OPINION AND MEMORANDUM [Resolving Doc. Nos. 36, 43]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendant the State of Ohio ("Ohio") moves this Court under Fed. R. Civ. P. 12(b)(6) to dismiss the above-captioned action for failure to state a claim upon which relief can be granted. Alternatively, Ohio moves to dismiss the action for lack of subject matter jurisdiction under Fed.R.Civ.P.12(b)(1). Plaintiffs Rachel, Carol, and Richard Haas oppose Ohio's motion. After considering the pleadings and the applicable law, the Court **GRANTS IN PART AND DENIES IN PART** Ohio's motion to dismiss and **DENIES** Plaintiffs' motion for leave to file a second amended complaint.

I. Background

On March 1, 2004, Plaintiffs filed this lawsuit against Quest Recovery Services, Inc.("Quest")and the City of Canton,

Ohio. On June 2, 2004, Plaintiffs voluntarily dismissed the City of Canton. Shortly after and on June 11, 2004, Plaintiffs filed an amended complaint. The amended complaint added Ohio as a defendant. In her amended complaint, Plaintiff Rachel Haas generally alleges that Ohio discriminated against her based on alleged physical disabilities by denying access to programs provided to non-disabled individuals.

The amended complaint claims that near September 19, 2002, Rachel Haas suffered various injuries when a truck struck her all terrain vehicle. Following the accident, she underwent extensive medical treatment and physical therapy. The Ohio Highway Patrol cited Rachel Haas for driving under the influence of alcohol at the time of the accident. On February 18, 2003, she pled guilty to the charges against her in Canton Municipal Court. After receiving her guilty plea, Judge Richard Kubilus sentenced Haas to confinement in Quest's drug and alcohol treatment facility in Massillon, Ohio for two six-day periods beginning March 13, 2003 and April 10, 2003.

With their complaint, Plaintiffs say Quest's facility lacked proper accommodations for Rachel Haas' injuries, such as an elevator and disabled-accessible toilets and showers. Plaintiffs allege that Quest personnel were rude and did not approve Rachel Haas' completion of the program.

II. Legal Standard

Ohio moves under Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can attack either the legal or the factual basis for jurisdiction. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In this case, Ohio attacks the legal basis

for jurisdiction, saying that it is immune from Plaintiffs' claims under the Eleventh Amendment of the U.S. Constitution. For purposes of deciding this motion, the Court accepts Plaintiffs' allegations as true. *Id.* Although Ohio couches its Eleventh Amendment argument as an alternative basis for dismissal, the Court addresses jurisdictional arguments first.

Ohio separately seeks dismissal under Fed.R.Civ.P.12(b)(6) for failure to sate claim. The Court grants a Rule 12(b)(6) motion when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* While the Court accepts all well pleaded allegations as true, the Court does not accept the "bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

The Court will consider only the well-pleaded factual allegations in the amended complaint itself. *Glicker v. Michigan Liquor Control Comm'n*, 160 F.2d 96, 101 (6th Cir. 1947) ("In considering the motion to dismiss we are controlled by the allegations of the Complaint."). The Court does not "take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute a pleading under Rule 7(a)." 2 MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2002).

III. Discussion

Plaintiffs' amended complaint sues Ohio under the following causes of action: (1) disability discrimination in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132; and (2) violation of the Rehabilitation Act, 29 U.S.C. §794(a). Ohio argues that this Court should dismiss the claims under Rule 12(b)(6) because Plaintiffs fail to state a claim against Ohio. In the alternative, Ohio argues that the Eleventh Amendment gives it immunity from Plaintiffs' claims.

Title II of the ADA states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act employs similar language:

> No otherwise qualified individual with a disability in the United States . . . shall, solely, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. §794(a). Although the Rehabilitation Act predates the ADA, "analyses of claims made under the two acts run roughly parallel." *Mahon v. Crowell*, 295 F.3d 585, 588-89 (6th Cir. 2002). The primary difference is that the Rehabilitation Act only covers programs or activities that federally-funded entities offer. *McPherson v. Michigan High School Athletics Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997). TitleII focuses on services, programs, or activities that "public entities" offer, regardless of federal funding.

A. Eleventh Amendment Immunity

Ohio bases its jurisdictional argument on Eleventh Amendment immunity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Eleventh Amendment immunity prevents federal courts from exercising jurisdiction over a claim, and bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-01(1984). Eleventh Amendment immunity extends to suits against a state by that state's own citizens. *S.J. v. Hamilton County*, 374 F.3d 416, 419 (6th Cir. 2004).

The Eleventh Amendment does not apply in two situations: (1) If Congress has abrogated the state's immunity, or (2) If the state has waived its immunity from suit in federal court. *Thiokol Corp. v. DOT*, 987 F.2d 376, 381 (6th Cir. 1993). In response to Ohio's motion, Plaintiffs claim that (1) Congress abrogated Ohio's immunity to claims arising under Title II of the ADA, and (2) Ohio waived its immunity to

Rehabilitation Act claims. The Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claim, but not to Plaintiffs' Rehabilitation Act claim.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), provides the starting point for the Eleventh Amendment analysis. In *Garrett*, the Supreme Court held that states are immune to suits for money damages under Title I of the ADA.[1] The Court found that Title I improperly abrogated the states' Eleventh Amendment immunity because it exceeded Congress's authority to enforce the Fourteenth Amendment's Due Process Clause. The Court held that only legislation that responds to a "history and pattern of unconstitutional. . .discrimination by the States" is a valid exercise of Congress's enforcement authority. *Id.* at 368. The remedy imposed "must be congruent and proportional to the targeted violation." *Id.* at 374.

Additionally, the Fourteenth Amendment does not require states to accommodate the disabled if the states' actions have a rational basis. *Id.* at 367. The Supreme Court explained that Title I required accommodation despite whether the states have rational bases for disability-based distinctions. *Id.* at 372-74. As a result, Title I did not validly abrogate Eleventh Amendment immunity.

Although *Garrett* did not address Title II, the Sixth Circuit applied *Garrett*'s reasoning to Eleventh Amendment immunity for Title II claims in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002). There, the plaintiff alleged that the lack of accommodations for his

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[1] Title I of the ADA generally prohibits employers from "discriminating against a qualified individual with a disability . . . in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

hearing disability prevented him from participating fully in a child custody hearing. The court concluded that Title II exceeded Congress's enforcement authority under the Equal Protection Clause, but also found that Title II may validly abrogate Eleventh Amendment immunity to enforce due process guarantees. In the court's words, Title II's "participation" requirement "serves to protect [the plaintiff's] due process right to a meaningful hearing . . . . " *Id.* at 815-16.

Tennessee v. Lane, --U.S. --, 124 S. Ct. 1978 (2004), is the most recent Supreme Court decision to address immunity for Title II claims. In *Lane*, the Supreme Court established that Title II is a valid exercise of Congress's Fourteenth Amendment enforcement authority to protect a plaintiff's due process right of access to the courts. *Id.* at 1992. In reaching its decision, the Court noted that Congress developed a legislative record documenting exclusion of the disabled from courthouses and court proceedings. *Id.* at 1990.

The Court further noted that Title II extends beyond the employment discrimination that Title I targets, seeking "to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 1988. Those constitutional guarantees include (1) the right of access to the courts, (2) the right of a criminal defendant "to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings," (3) the right of certain civil litigants to "a meaningful opportunity to be heard," (4) the right of criminal defendants to a trial by jury, and (5) the public's First Amendment right of access to criminal proceedings. *Id.* (citations omitted).

The Supreme Court concluded that Title II was a congruent and proportional response to the documented

infringement of access to the courts. *Id.* at 1993-94. The Supreme Court made clear that the decision only addressed the right of access to the courts, and not any other application of Title II: "[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 1993.

The Court knows of no cases from the Sixth Circuit or any other circuit that apply *Lane* under the circumstances presented here. The lone case from the Sixth Circuit does not address this issue. *See S.J. v. Hamilton County*, 374 F.3d 416, 421-22 (6th Cir. 2004) (applying *Lane* outside Title II context to help determine whether local government is an arm of the state for purposes of Eleventh Amendment immunity).

Nor do the cases from other circuits provide much guidance on applying *Lane* to these circumstances. *See Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004) (vacating dismissal of plaintiff's Title II claim that "during his trial he was denied due process because there was no reasonable accommodation for his hearing impairment"); *Roe v. Johnson*, No.03-CIV-8501, 2004 U.S. Dist. LEXIS 17483, at *14 (S.D. N.Y. Aug. 31, 2004) (granting motion to dismiss Title II claim that state bar association denied plaintiff's application based on disabilities); *Douris v. Bucks County Office of the DA*, No. 03-CV-5661, 2004 U.S. Dist. LEXIS 12769, at *13 (E.D. Pa. July 6, 2004) (noting that inmate's Title II claim was "problematic," but granting defendants' motion for summary judgment on other grounds); *McNulty v. Board of Educ.*, Civ. No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, at *9 (D. Md. July 8, 2004) (granting motion to dismiss; finding that "Eleventh Amendment immunity remains intact for education claims under Title II of the ADA"); *Solley v. Big*

Spring State Hosp., No. 1:03-CV-094-C,

2004 U.S. Dist. LEXIS 12958, at *13 (N.D. Tex. July 12, 2004) (granting defendant's motion for partial summary judgment; finding that the Eleventh Amendment bars money damages claims for Family and Medical Leave Act violations).

Some cases merit further attention. In *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D. N.Y. 2004), the Southern District of New York held that an inmate's Title II claim against the city of New York was actionable under *Lane*. The inmate had difficulty walking because of injuries he sustained in an automobile accident. The inmate alleged that the city violated Title II by placing him "in housing that was far from such prison services as the law library and infirmary, thus forcing Plaintiff to walk great distances to use these facilities and causing him great pain due to his medical condition." *Id.* at 441.

In finding that Eleventh Amendment immunity did not apply, the court interpreted *Lane* as "upholding [the] ADA's abrogation of a State's Eleventh Amendment immunity . . . ." *Id.* at 442. That interpretation exceeds the scope of the Supreme Court's opinion. *Lane* does not say that the ADA abrogated Eleventh Amendment immunity entirely. Instead, the Supreme Court held only that Title II abrogated Eleventh Amendment immunity for claims implicating the "constitutional right of access to the courts." *Lane*, 124 S. Ct. at 1993. *Carrasquillo* does not persuade this Court.

Nor does the Western District of Wisconsin's decision in *Flakes v. Frank*, 322 F. Supp. 2d 981 (W.D. Wis. 2004). In *Flakes*, the court reconsidered its previous decision denying an

inmate's request to proceed with Title II claims against the Secretary of Wisconsin's Department of Corrections. The inmate alleged that the defendant violated Title II by failing to provide various medical services and assistance. *Flakes v. Frank*, No. 04-C189-C, 2004 U.S. Dist. LEXIS 7650, at *11-12 (W.D. Wis. Apr. 30, 2004). The court initially dismissed the inmate's Title II claims based on Seventh Circuit precedent that the ADA did not abrogate Eleventh Amendment immunity with respect to Title I (not Title II) claims. *Flakes*, 322 F. Supp. 2d at 982-83. After *Lane*, the court held that "[a]lthough it may be that in the final analysis, I will conclude that [*Lane*]'s narrow scope does not encompass plaintiff's ADA claims, at this stage of the proceedings I cannot say that plaintiff could prove no set of facts entitling him to relief on his ADA claims." *Id.*

Unlike *Flakes*, this Court relies on both *Lane* and Sixth Circuit precedent that squarely addresses Eleventh Amendment immunity for Title II claims and limits abrogation to Title II claims implicating due process rights. *See Popovich*, 276 F.3d at 811. *Popovich* is consistent with *Lane*'s finding that Title II abrogates Eleventh Amendment immunity to the extent that Title II claims are based on the due process right of access to the courts.

Finally, the Court notes the Ninth Circuit's opinion in *Phiffer v. Columbia River Corr. Inst.*, No. 01-35984, 2004 U.S. App. LEXIS 19152 (9th Cir. Sept. 13, 2004). There, the Ninth Circuit found that its pre-*Lane* decision that Title II entirely abrogates Eleventh Amendment immunity was consistent with *Lane*. The Ninth Circuit based its opinion on pre-*Lane* precedent that Title II abrogated immunity if the claims sound indue process *or* equal protection. *Id.* at*2-4. Because the

Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court, *Phiffer* is not instructive.

In light of *Garrett*, *Popovich*, and *Lane*, the Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' Title II claims. Plaintiffs' ADA claims against Ohio sound in equal protection, not due process. "[A] Title II claim sounds in due process and abrogates sovereign immunity where the plaintiff alleges that he was excluded from participating in a proceeding guaranteed to him by the Due Process Clause on the basis of his disability." *Robinson v. University of Akron Sch. of Law*, 307 F.3d 409, 413 (6th Cir. 2002).

In their brief, Plaintiffs contend that Ohio violated Title II by (1) sending Plaintiff Rachel Haas to a drug and alcohol treatment facility that did not accommodate persons with disabilities, and (2) failing to provide accommodations for the disabled at the allegedly state-owned building that Quest uses. [Doc. 43 at 11-14]. Plaintiffs do not allege that Ohio denied Rachel Haas any due process protections because of her disability. Plaintiffs' claims against Ohio are essentially that Rachel Haas was treated differently from non-disabled individuals: "[S]he did not receive the same favorable alternative to incarceration as her non-handicapped counterparts." [Doc. 43 at 13]. As such, Plaintiffs' claims sound in equal protection, not due process.

The Court notes that *Lane* expressly limited its abrogation of Eleventh Amendment immunity to TitleIIclaimsregarding"theconstitutionalrightofaccesstothecourts." 124 S. Ct. at 1993. The Supreme Court identified other fundamental rights violations that could properly fall within the scope of Title II claims. Plaintiffs' claims do not fit those other

categories. Plaintiffs' claims against Ohio do not implicate the right of access to the courts, the right to be present at a trial, the right to a meaningful opportunity to be heard, the right to a trial by jury, or the public's right of access to criminal proceedings. *Id.* at 1988. Plaintiffs' claims against Ohio sound in equal protection, not due process. The Court holds that Title II does not abrogate Ohio's Eleventh Amendment immunity to Plaintiffs' ADA claims.

Although courts generally apply the same analysis to claims under the ADA and the Rehabilitation Act, Eleventh Amendment immunity presents an exception. In the Sixth Circuit, it is well-settled that the states waive their Eleventh Amendment immunity to Rehabilitation Act claims by accepting federal funds. *See, e.g., Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001) (citing 42 U.S.C. §2000d-7). Plaintiffs allege that Ohio accepts federal funds. ¶ 41.[2] Viewing the facts in the light most favorable to Plaintiffs, the Court finds that Ohio waived its immunity to Rehabilitation Act claims.

B. Failure To State A Claim

Plaintiffs contend that Ohio violated the ADA and the Rehabilitation Act by denying Rachel Haas access to and participation in services, programs, and activities that Ohio furnished to non-disabled individuals. Ohio says that based on the amended complaint's allegations, Quest is a private agency and is not under Ohio's control. Although the Court agrees that Plaintiffs fail to state a claim against Ohio under the ADA

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[2] Paragraph references are to the amended complaint, [Doc. 25].

and the Rehabilitation Act for direct disability discrimination, Plaintiffs' Rehabilitation Act claim regarding Ohio's duties as a property owner survives.

To state a claim of disability discrimination under Title II of the ADA, a plaintiff must allege that "(1) she has a disability; (2)she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability." *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). A plaintiff must allege the same elements to state a claim under the Rehabilitation Act. *Mahon*, 295 F.3d at 589. For purposes of Ohio's Rule 12(b)(6) motion, there are no relevant differences between Title II of the ADA and Section 504 of the Rehabilitation Act. A separate analysis of the Rehabilitation Act claim is unnecessary. *See Jones*, 341 F.3d at 477 n.3.

Plaintiffs satisfy the first and second elements by alleging that Rachel Haas was a qualified individual with a disability. Ohio does not challenge this allegation.

To satisfy the third element, Plaintiffs must sufficiently allege that Ohio's actions caused Rachel Haas to be excluded from participation in, denied the benefits of, or discriminated against under the Quest program because of her disability. Plaintiffs offer two core allegations. [Doc. 43 at 11-14]. First, Ohio committed "direct disability discrimination" when Judge Kubilus ordered Rachel Haas to confinement in a private facility that lacked accommodations for the disabled. Second, Ohio did not meet its obligations as the owner of the property used by Quest. Ohio responds that Plaintiffs have not linked the alleged discrimination by Quest personnel to the state.

Plaintiffs' "direct disability discrimination" claim does not pass muster. Plaintiffs allege that Judge Kubilus

understood the extent of Rachel Haas' injuries when he sentenced her to confinement at Quest's facility, and that the Quest program "offered numerous advantages to the participants over the local jails." ¶¶ 12, 13, 37. Plaintiffs do not sufficiently allege that Ohio denied Rachel Haas access to any of the services that Quest offers to program participants. She met with program counselors and participated actively. ¶ 26. Quest's staff delivered food to her room when she had difficulty getting to the dining facility. ¶ 25. Although the staff allegedly forgot to deliver the food "on several occasions," Plaintiffs do not allege that this resulted from discrimination. *Id.*

To the extent Rachel Haas experienced hardships at the Quest facility, Plaintiffs do not allege that those difficulties resulted from discrimination by the state. Although Haas says that Quest's staff "was rude and abusive," Plaintiffs do not allege that Ohio directed Quest's staff to act in such a manner. ¶ 21. Nor do Plaintiffs allege that Ohio directed Quest personnel to impede Rachel Haas' access to physical therapy and pain medication. Although Plaintiffs allege that Ohio owned the building that housed the program, they describe Quest as a "private facility." ¶ 33. None of these allegations imply disability discrimination by Ohio. Plaintiffs have not sufficiently pled that Ohio is responsible for Quest's alleged wrongdoing.[3]

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[3] In *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998), the Sixth Circuit identified four factors it will consider in the Title II context to determine whether to view a facility as an arm of the state:

> 1) Whether the entity is operated with public funds;
> 2) Whether the entity's employees are considered government employees;
> 3) Whether the entity receives significant assistance

Even if Plaintiffs sufficiently alleged their "direct disability discrimination" claim against Ohio, they still would have no claim. Plaintiffs contend that the amended complaint "charges an instrumentality of the State with directly violating both the ADA and the Rehabilitation Act." [Doc. 43 at 12] (emphasis in original). Plaintiffs identify Judge Kubilus as the "instrumentality" in question. *Id.* In Plaintiffs' words, "Judge Kubilus was unconcerned with whether Plaintiff was being required to attend a program that was unable to accommodate her readily observable disabilities." *Id.*

Judge Kubilus has judicial immunity for his sentencing decision. "A judge performing his judicial functions is absolutely immune from suit seeking monetary damages." *Johnson v. Turner*, 125 F.3d 324, 333 (6th Cir. 1997). "Immunity is available even if a judge acts erroneously, corruptly, or in excess of his jurisdiction." *Id.* Plaintiffs' dissatisfaction with Judge Kubilus's decision does not provide a cause of action against Ohio. *See Saint-Fleur v. City of New York*, No. 99-CIV-10433, 2000 U.S. Dist. LEXIS 8814, at *18 (S.D. N.Y. Mar. 14, 2000) ("To the extent that [the plaintiff's] claim against the State is, in reality, an attempt to sue state court judges for damages, his claims are barred."). Plaintiffs fail to state a claim against Ohio for direct disability

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> from the government by provision of property or equipment; and
> 4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572. At most, Plaintiffs allege that Ohio assisted Quest by providing access to the state-owned building. Plaintiffs offer no allegations regarding the status of Quest's employees, Quest's sources of funding, or the composition of Quest's board of directors.

discrimination under the ADA and the Rehabilitation Act.

Plaintiffs fare better on their claim regarding Ohio's obligations as the owner of the property. Plaintiffs allege that Ohio owns the Quest facility. ¶ 14. In *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), the Sixth Circuit addressed the obligations of property owners under Title II and the Rehabilitation Act and held that "public entities have a duty to provide accessible facilities even when those facilities are used by contractors." As in *Johnson*, "[Ohio] definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* at 572.

At this stage, the Court cannot rule as a matter of law that Ohio met its obligations as owner of the property. The Court notes that the accessibility requirements are "subject to the bounds of reasonableness." *Id.* at 571. After the completion of discovery, Ohio may very well come forward with evidence that it has taken reasonable steps to provide disabled access to the facility, or that "making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7). Because Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claims, only the Rehabilitation Act claim on this issue survives.

C. Leave To Amend

Plaintiffs request leave to file another amended complaint. Plaintiffs have already filed two complaints in this action. The dispositive discovery deadline is September 23, 2004. The dispositive motion deadline is September 30, 2004. Under these circumstances, the Court finds that Plaintiffs' request is untimely and would impose undue hardship on the other parties. *See Head v. Jellico Housing Auth.*, 870 F.2d

1117, 1124 (6th Cir. 1989). Additionally, amendment would not cure the legal flaws of the dismissed claims.

IV. Conclusion

For these reasons, this Court dismisses Plaintiffs' ADA claims against Defendant Ohio in their entirety under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Court also dismisses Plaintiffs' Rehabilitation Act claim against Ohio for direct disability discrimination under Rule 12(b)(6). Plaintiffs' Rehabilitation Act claim against Ohio for failure to comply with disabled accessibility requirements may proceed. The Court denies Plaintiffs' request for leave to amend.

IT IS SO ORDERED.

Dated: September 20, 2004

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS 8344 Chapel Street Waynesburg, Ohio 44688 **and** **CAROL HAAS** 8344 Chapel Street Waynesburg, Ohio 44688 **and** **RICHARD HAAS** 8344 Chapel Street Waynesburg, Ohio 44688 **Plaintiffs,** **vs.** **QUEST RECOVERY SERVICES, INC.** 1341 Market Ave., North Canton, Ohio 44714-2675 **and** **CITY OF CANTON** c/o Department of Law City Hall – 7th Floor 218 Cleveland Ave., S.W. Canton, Ohio 44701 **Defendants.**	**CASE NO.** **JUDGE** **COMPLAINT** **[JURY DEMAND ENDORSED HEREON]** 5:04CV0409 CASE NO.

COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their Complaint against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the City was and is a political subdivision organized under Ohio law and capable of suing and being sued.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the City's Municipal Court. *Case No. 2002 TRC 10088.*

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her. Plaintiff was then sentenced accordingly by Judge Kubilus.

12. In a further order issued on February 26, 2003, Judge Kubilus directed that Plaintiff was to be confined for two (2) six-day periods at Quest's facility in Massillon, Ohio. Notwithstanding her physical impairments, she was directed to begin the first session on March 13, 2003.

13. At all times thereafter, Quest acted as an agent and/or extension of the City by performing a *quasi*-municipal function under the City's ultimate supervision, direction, and control.

14. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as prescribed by her physicians.

15. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

16. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were

extremely painful and embarrassing for Plaintiff.

17. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

18. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment. For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

19. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

20. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery

was in jeopardy.

21. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared to climb six (6) flights of steps three (3) times a day. *See Exhibit A, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible. *Id.* He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

22. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

23. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance abuse treatment.

24. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would <u>not</u> be approved. Plaintiff was emotionally devastated as a result.

25. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted on April 4, 2003 in the City's Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

26. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

27. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

28. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

29. Following her accident of September 19, 2002, Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2)*. These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

30. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C. §12181(6)* and was thus

subject to Title III of the Americans with Disabilities Act (ADA).

31. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

32. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a).* Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

33. At all times herein relevant, the City was a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

34. At the time of Plaintiff's conviction and sentencing, the City was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

35. In the manner aforementioned, the City violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and

activities that were being furnished to non-handicapped individuals. The City further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

36. In accordance with *42 U.S.C. §12133* and *29 U.S.C. §794*, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

37. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

38. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the City as described herein received federal financial assistance, directly or indirectly, and thus were subject to the Rehabilitation Act. *29 U.S.C. §794(a)*.

39. As a consequence of the substantial physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

40. In the manner aforementioned, Defendants

discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a)*. This disparate treatment was imposed upon Plaintiff because of her disabilities.

41. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

42. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

43. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
CIVIL RIGHTS VIOLATIONS

44. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

45. At all times herein relevant, Plaintiff was a citizen of the United States and thus entitled to the full benefits and equal protection of the federal constitutional and all laws and regulations enacted thereunder.

46. In the manner aforementioned, Defendants and their officials, employees, agents, and representatives were

acting at all times under the color of the statutes, ordinances, regulations, customs, and usage of the State of Ohio, County of Stark, and City of Canton. Quest, in particular, served as an instrumentality of the City in providing what was essentially a municipal service at the City's request and under the City's ultimate control.

47. In the manner aforementioned, Defendants knowingly and purposefully deprived Plaintiff of her clearly established rights, privileges, and immunities as secured by the Constitution and laws of the United States in violation of *42 U.S.C. §1983.* These clearly established rights included, but were not limited to, those afforded under the Eighth Amendment (Cruel and Unusual Punishment) and Fourteenth Amendment (Due Process and Equal Protection). As alleged in Count I and II of this Complaint, Plaintiff was further denied her rights under the federal ADA and Rehabilitation Act.

48. Defendants' officials, employees, agents, and representatives knew, or should have known, that their acts and omissions as herein described were prohibited under federal law.

49. At all times herein relevant, Plaintiff was treated in accordance with the procedures, practices, and policies that had been established and approved by the City's duly authorized officials and policymakers.

50. As a direct and proximate result of Defendants' interference with Plaintiff's federal constitutional and statutory rights, she has suffered substantial damages and losses, which are expected to be ongoing.

COUNT IV
NEGLIGENCE/INTENTIONAL TORT

51. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

52. At all times herein relevant, Defendants were subject to a common law duty that required them to afford due care to Plaintiff and make reasonable accommodations for her safety.

53. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

54. Defendants' legal responsibilities to Plaintiff were further established in various laws and regulations applicable to them, including those pertaining to accommodations for the handicapped and other safety standards.

55. Through no fault of Plaintiff, Defendants carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Defendants' negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;
e. warn Plaintiff of dangers posed to her; and

f. establish effective procedures to allow residents to receive the medical care, rehabilitation services, and medicine they required.

56. In the manner aforementioned, Defendants' negligence and negligence *per se* was committed in connection with physical defects existing within grounds and/or buildings that were used in connection with the performance of proprietary and/or governmental functions within the meaning of *O.R.C. §2744.02(B)(4)*.

57. Defendants knew, or in the exercise of due care should have known, that they were jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Defendants thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

58. As a direct and proximate result of Defendants' negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT V
INFLICTION OF EMOTIONAL DISTRESS

59. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

60. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should

have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

61. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

62. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT VI
LOSS OF CONSORTIUM

63. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

64. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

65. As a direct and proximate result of the acts and omissions of Defendants as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby requested upon all issues.

Respectfully Submitted,

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS, *et al.*	**CASE NO. 5:04cv00409**
Plaintiffs,	**JUDGE JAMES S. GWIN**
vs.	**FIRST AMENDED COMPLAINT**
QUEST RECOVERY SERVICES, INC.	**[JURY DEMAND ENDORSED HEREON]**
Defendant.	
and	
STATE OF OHIO c/o James Petro, Attorney General 30 E. Broad St., 17th Floor Columbus, Ohio 43215-3428	
New Party Defendants.	

FIRST AMENDED COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their First Amended Complaint against Defendant, Quest Recovery Services, Inc. (hereinafter "Quest") and New Party Defendants, and the State of Ohio (hereinafter the "State"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the State was and is a governmental entity capable of suing and being sued. The State established, funds, and maintains the Canton Municipal Court, whish is an instrumentality thereof.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was

struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the Canton Municipal Court. *Case No. 2002 TRC 10088.*

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her.

12. Prior to sentencing, the Court had been provided with a letter from Plaintiff's physical therapist, Rick Gustaitis, dated January 27, 2003, a true and exact copy of which is appended hereto as *Exhibit A.* Therein, he described the nature of Plaintiff's injuries and opined that she would need 3-6 months of continued physical therapy, any disruption of which "would be very detrimental to her progress."

13. In an entry issued on or about February 18, 2003, Judge Kubilus directed that Plaintiff was to be confined for ten (10) days at Quest's facility in Massillon, Ohio (hereinafter the "facility"). Notwithstanding her physical impairments, she was ordered to enter the program by February 28, 2003. *See Exhibit B, appended hereto.*

14. Plaintiff reasonably believes, and therefore alleges, that Quest's facility was constructed, owned, and/or maintained by the State.

15. In a further order issued on February 26, 2003, Plaintiff's sentence was increased to two (2) 6-day periods of confinement which were to commence, respectively, on March 13, 2003 and April 10, 2003.

16. At all times thereafter, Quest acted as an agent and/or extension of the State by performing a *quasi*-governmental function under the ultimate supervision, direction, and control of the Court and/or State.

17. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as prescribed by her physicians.

18. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and

discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

19. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were extremely painful and embarrassing for Plaintiff.

20. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

21. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment. For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

22. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers

that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

23. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery was in jeopardy.

24. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared to climb six (6) flights of steps three (3) times a day. *See Exhibit C, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible. *Id.* He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

25. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

26. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance

abuse treatment.

27. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would not be approved. Plaintiff was emotionally devastated as a result.

28. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted on April 4, 2003 in the Canton Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

29. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

30. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

31. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

32. Following her accident of September 19, 2002,

Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2)*. These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

33. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C. §12181(6)* and was thus subject to Title III of the Americans with Disabilities Act (ADA).

34. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

35. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a)*. Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

36. At all times herein relevant, the State is a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

37. At the time of Plaintiff's conviction and

sentencing, the State was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

38. In the manner aforementioned, the Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

39. In accordance with *42 U.S.C. §12133* and *29 U.S.C. §794*, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

40. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

41. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the State as described herein received federal financial assistance, directly or indirectly, and thus were subject to the

Rehabilitation Act. *29 U.S.C. §794(a).*

42. As a consequence of the substantial physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

43. In the manner aforementioned, Defendants discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a).* This disparate treatment was imposed upon Plaintiff because of her disabilities.

44. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

45. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

46. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
NEGLIGENCE/INTENTIONAL TORT

47. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

48. At all times herein relevant, Quest was and is subject to a common law duty that required it to afford due care to Plaintiff and make reasonable accommodations for her safety.

49. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

50. Quest's legal responsibilities to Plaintiff were further established in various laws and regulations applicable to it, including those pertaining to accommodations for the handicapped and other safety standards.

51. Through no fault of Plaintiff, Quest carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Quest's negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;
e. warn Plaintiff of dangers posed to her; and
f. establish effective procedures to allow residents to receive the medical care,

rehabilitation services, and medicine they required.

52. Quest knew, or in the exercise of due care should have known, that it was jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Quest thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

53. As a direct and proximate result of Quest's negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT IV
INFLICTION OF EMOTIONAL DISTRESS

54. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

55. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

56. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

57. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT V
LOSS OF CONSORTIUM

58. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

59. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

60. As a direct and proximate result of the acts and omissions of Quest as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby

requested upon all issues.

Respectfully Su[illegible]ted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2004, the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Paul W. Flowers, Esq.
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(3)

No. 06-263

In the Supreme Court of the United States

RACHEL HAAS, et al.,

Petitioners.

v.

QUEST RECOVERY SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state sentencing judge have absolute judicial immunity from suit for alleged discriminatory acts that occur at the privately-run rehabilitation facility where a defendant serves her sentence?

2. Do States retain their Eleventh Amendment immunity against money-damages suits brought in federal court under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, if the plaintiff does not allege court-access issues or any independent constitutional violation?

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INTRODUCTION

This case does not warrant review or remand for several reasons. Petitioner Rachel Haas purports to raise, in her first question presented, an issue that may be important and interesting, but is here unreachable—Ohio's Eleventh Amendment immunity from suit under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131 to 12165. That issue can never be reached here because the State of Ohio could be liable under the ADA only under two theories, neither of which is viable in this case.

First, the alleged discriminatory acts—all by private parties—took place in a building owned by the State of Ohio, but leased to the private company through intermediaries. Ohio might arguably be liable under the Rehabilitation Act ("RA")—and therefore also Title II because it owns the building in which the allegedly discriminatory acts took place. *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). However, that aspect of its liability—our derivative liability as a property owner that did not run the program—was settled with petitioner. And with that form of liability no no longer active, the case now involves only direct-discrimination claims against Ohio.

But the direct-liability theory does not work for Haas here against the State. The only direct state actor in the drama is the state municipal court judge who sentenced Haas to the private rehabilitation program that allegedly discriminated against her. Thus, to reach the ADA question, Haas has to overcome the judge's absolute judicial immunity. That is why Haas raises judicial immunity in her second question presented. But that question should be first, as the Court must reach it and resolve it in Haas's favor before getting to the ADA issue. But Haas cannot clear that first hurdle, as the Court has no reason to revisit its longstanding and consistent jurisprudence on judicial immunity.

Moreover, even if the Court could reach the Eleventh Amendment-ADA question, this case is a poor vehicle, because Haas's complaint did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress's power to enforce the Fourteenth Amendment.

Indeed, the United States's brief confirms that this case is a poor vehicle to review the ADA issue, as the United States does not ask for full review, but asks only for remand so that the Sixth Circuit can correct its analysis. But even remand is unwarranted here, as the Sixth Circuit came to the correct conclusion regarding Title II discrimination by private parties, even if the court arguably used the wrong Eleventh Amendment analysis in dicta. For these and other reasons below, the Petition should be denied.

STATEMENT OF FACTS

Rachel Haas became disabled when she drove an all-terrain vehicle while drunk, crashed into a truck, and sustained severe injuries that resulted in permanent disabilities. At her criminal trial, she pleaded guilty to the charge of driving under the influence of alcohol. As an alternative to incarceration for her DUI conviction, Judge Richard Kubilus of the Canton Municipal Court ordered her to attend a driver intervention program run by Quest Recovery Systems, Inc. ("Quest"), a private entity. She was to undergo two six-day driver intervention programs (DIPs) conducted by Quest.

Under Ohio law, entities providing DIPs must not discriminate on the basis of disability and must make the programs available to disabled clients. For example, the Ohio Administrative Code contains a client's bill of rights for DIPs that includes the right to be free of disability discrimination. Ohio Admin. Code Ann. 3793:4-1-02. The law also requires private DIPs to have a procedure for clients to grieve alleged discrimination or mistreatment on the basis of disability. *Id.*

Haas alleges that Quest discriminated against her in the program by failing to accommodate her disabilities. Quest therefore failed to follow the legal requirements of Ohio law, without the sanction or knowledge of the State of Ohio.

Haas sued both Quest and the State of Ohio, raising state law claims against Quest and federal claims under the ADA and the RA against both Quest and the State. Haas settled all her claims with Quest for an undisclosed sum, and her RA claims against the State.[1] The only remaining claims here are for Title II direct disability discrimination by the State of Ohio.

Both the District Court and the Sixth Circuit Court of Appeals correctly dismissed all direct discrimination claims against the State of Ohio because the discriminatory acts were all performed by a private party, without either the knowledge or sanction of the State of Ohio. Both courts also held that the judge who sentenced Haas is protected by absolute judicial immunity.

REASONS FOR DENYING THE WRIT

The Petition should be denied, as full review is not needed here, and the Court need not grant, vacate, and remand the case either. The judicial-immunity issue is not certworthy, and Haas loses that issue under settled law. Thus, the Court cannot even reach her purported ADA/Eleventh Amendment issue.

Second, even if the Court were to reach the Eleventh Amendment question, Haas did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress's power to enforce the Fourteenth Amendment. As the United States correctly asserts, the Sixth Circuit affirmed the District Court holding that Petitioner Haas failed to state a claim against the State of Ohio under

---

[1] The RA claims against the State arise because it ultimately owned the building that was leased, through two intermediaries, to Quest.

Title II. Pet. App. 6a-9a; U.S. Br. 8. As the rehabilitation program that Haas attended was not run by the State of Ohio, nor was its discrimination sanctioned by state statute or regulation, the State of Ohio did not discriminate "in the operation of public services, programs," or "activities." Under the analysis articulated in *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877 (2006), the Sixth Circuit should have stopped there, and its Eleventh Amendment analysis was unnecessary and superfluous.

And the United States seeks a futile act in asking the Court to grant certiorari only to remand for the Sixth Circuit to reanalyze its Eleventh Amendment dicta in light of *Georgia*. The United States acknowledges that the State was properly dismissed, and that acknowledgement means that the United States also agrees that the Eleventh Amendment analysis below was merely dicta. Remanding a case simply to eliminate dicta is unnecessary and a waste of judicial resources. Thus, the petition should simply be denied.

A. The absolute judicial immunity issue does not warrant the Court's review.

The Court need not revisit its jurisprudence regarding the absolute immunity of judicial officers. Haas asserts neither conflict in the circuits nor overriding policy arguments compelling the Court's review of its judicial immunity decisions or the lower courts' decisions on judicial immunity in this case.

Long-standing and consistent precedent holds that judges have absolute judicial immunity when engaged in a judicial function. *Forrester v. White*, 484 U.S. 219, 226-27 (1988). Indeed, the history of absolute judicial immunity goes back at least to English common law. See *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 349 (1872), citing *Scott v. Stansfield*, 3 Law Reports Exchequer 220. Moreover, the Court has held that absolute judicial immunity applies with undiminished force even when the judge is accused of

discriminating on the basis of race in violation of 42 U.S.C. § 1983, much less when discriminating on the basis of disability. *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). And even if discrimination created an exception to judicial immunity, the exception would not be implicated here, since Haas admits that the judge had no intention of subjecting her to disability discrimination: "There is no reason whatsoever to believe that Municipal Judge Kubilus had intended for [Haas] to be confined in a non-compliant facility." Pet. at 20.

In short, Haas has presented no sound reason for the Court to take her second question presented and revisit its holdings on absolute judicial immunity. Haas's arguments reveal her real motive for challenging judicial immunity: Haas needs to overcome judicial immunity to reach the State, as she has no other way to collect damages from the State of Ohio for the acts of Quest, a private entity from whom she has already collected an undisclosed amount in damages. But Haas's desire to reach the State is no reason to revisit the settled issue of judicial immunity.

B. The issue regarding Title II and Eleventh Amendment immunity does not warrant full review or remand.

1. The Court cannot reach the issue of Title II's abrogation of States' Eleventh Amendment immunity, because Haas cannot overcome judicial immunity and she has not otherwise properly stated a claim against a state actor.

Title II does not create a cause of action against a State for the actions of private parties. But Haas's allegations are focused on Quest, the private entity that housed the program she attended in lieu of her prison sentence. Haas's amended complaint included only two allegations against the State of Ohio for direct discrimination:

> 16. At all times . . . Quest acted as an agent and/or extension of the State by performing a quasi-governmental function under the ultimate supervision, direction, and control of the Court and/or State. . . .
>
> 38. . . . The court and/or State further subjected Plaintiff to discrimination by . . . ordering her to be confined in a privately operated system [Quest].

But Quest cannot simultaneously be both a state agent (as in her paragraph 16) and a private party (as in her paragraph 38), so these allegations do not directly link Quest or its actions to the State of Ohio.

Haas grasps at two factors remotely linking the State of Ohio to her claims—the municipal court judge and the building in which Quest housed its programs—but neither of these factors creates liability for the State of Ohio under Title II.

First, Ohio's ownership of the building where Quest ran its program does not create a direct-discrimination claim against the State of Ohio. In *Johnson v. City of Saline*, 151 F.3d 564, 571-72 (6th Cir. 1998), the Sixth Circuit held that a public entity that leases or rents its facilities to nonpublic entities is subject to Title II of the ADA because it is a landlord. The district court below found that the State of Ohio is subject to liability as a landlord because of its ultimate ownership of the Quest building, but the State of Ohio and Haas settled that part of the case. And because Quest is not a public entity, the State of Ohio is not subject to direct liability under Title II.

Second, Haas cannot reach the State through the judge's acts, as she cannot overcome judicial immunity. Judicial immunity is overcome only in two circumstances, neither of which Haas even alleges apply: "First, a judge is

not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Because issuing an order is judicial in nature, see *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994), the first circumstance does not apply. And of course, the municipal court judge had jurisdiction to sentence Haas for violating Ohio's DUI laws. Therefore, the judge is absolutely immune, and no link between the State of Ohio and the municipal court judge exists.

Haas cites only one case to support her claimed right to pursue a Title II claim. See Pet. at 18, citing *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998). But *Yeskey* involved a prison in which state employees, and not private parties, were alleged to have committed acts that violated the ADA. See *id.* Haas fails to cite a single case in which disabled prisoners sue under Title II based on the judge's act in sentencing them, rather than direct acts of discrimination by state employees of the prisons.

Thus, the Sixth Circuit properly concluded that Haas failed to state a Title II claim against Ohio. Consequently, the Court cannot reach the question of whether Haas's Title II claim would be the type that could overcome Ohio's Eleventh Amendment immunity, as Haas has not even stated a Title II claim of any type against Ohio.

2. Haas's Eleventh Amendment argument does not warrant the Court's full review.

Even if the Court could somehow reach the first question presented, this case is a poor vehicle to review any question of State immunity from Title II claims. Specifically, this is not an appropriate case for the Court to refine or clarify either *Tennessee v. Lane*, 541 U.S. 509 (2004), as Haas suggests, or its recent holding in *United States v. Georgia*, which Haas's brief does not mention. Each of these

cases may leave open interesting and important questions, but none of those questions is presented here.

First, this case would not clarify the scope of the constitutional guarantees that plaintiffs may enforce against the States under Title II. *Lane* and *Georgia* both held that, at a minimum, state sovereign immunity was abrogated for conduct that actually violates the Fourteenth Amendment, and that it is not limited to violations of the Eighth Amendment. *Lane*, 541 U.S. at 531; *Georgia*, 126 S. Ct. at 882. In *Lane*, the Court stated that "[b]ecause we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further." 541 U.S. at 531, citing *United States v. Raines*, 362 U.S. 17, 26 (1960). Haas does not even allege a court-access issue. And even if doubts remain about which constitutional guarantees are enforceable against the States through Title II, that issue is absent here because Hass's complaint fails to allege any violation of a constitutional right at all. Rather, she alleges only a violation of the ADA.

Nor would this case clarify the scope of prophylaxis Congress is constitutionally permitted to apply to remedy disability discrimination by state actors. When Congress purports to exercise its authority under Section 5 of the Fourteenth Amendment, the Court requires "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). But this case does not present the question of whether Title II is congruent and proportional under *Boerne*, because Haas alleges no direct activity by a state actor or agent. All of the alleged discriminatory acts were committed by private parties in the employ of a private company. Ohio never sanctioned the alleged discriminatory actions, nor does Ohio law permit them.

In short, this case presents no interesting and important questions about the application or constitutionality of Title II of the ADA, so the Court should deny the writ.

3. This case should not be remanded to the Sixth Circuit for it to review the Eleventh Amendment issue.

Finally, not only is this case not worthy of the Court's full review, but also, the case does not warrant remand for reconsideration, as remand would not change the result below. The Sixth Circuit properly dismissed the State of Ohio because Haas failed to state a claim against it. Thus, the Eleventh Amendment discussion was dicta. Further, if the Court were to remand this case for its consideration under the test recently established in *United States v. Georgia*, 546 U.S. 151 (2006), the outcome would remain the same—a dismissed complaint against the State of Ohio.

The Sixth Circuit's Eleventh Amendment discussion is dicta because it first held that Haas failed to state a Title II claim against the State of Ohio. As the lower courts recognized, "the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge." See Pet. App. 7a. As discussed in Part B.1 above, the lower courts correctly determined that the State of Ohio is not liable for criminal sentences issued by a municipal court judge. The Sixth Circuit therefore properly affirmed the district court's dismissal because Haas failed to satisfy pleading requirements. See Pet. App. 9a. Thus, the Sixth Circuit's Eleventh Amendment immunity analysis is unnecessary to its disposition of the case. Consequently, vacatur and remand would be a waste of judicial resources, as the result would remain the same.

Further, even if the Sixth Circuit applied the three-step framework set forth in *United States v. Georgia*, the Sixth Circuit would arrive at the same result. The first prong of the *Georgia* step requires a court to determine in the first

instance, on a claim-by-claim basis, which aspects of the State's alleged conduct violated Title II. Again, the State of Ohio did not violate Title II, because Haas fails to allege any direct act of discrimination by the State of Ohio.

Only if the State has violated Title II does the court proceed to the second step to analyze the extent to which such misconduct also violated the Fourteenth Amendment. So even if Haas had alleged that the State of Ohio violated Title II, Hass still falls short, as she fails to assert any constitutional violation by the State of Ohio.

Finally, even if Haas could somehow reach step three, she would fail that step, in which a court analyzes, insofar as the alleged misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. And yet again, because Haas fails to assert that any action by the State of Ohio violated Title II of the ADA or the Fourteenth Amendment, the Sixth Circuit would not need to reach the issue of Eleventh Amendment immunity. This case therefore does not need to be addressed under the *Georgia* analysis.

Thus, the Sixth Circuit's result would be the same under the *Georgia* analysis. The only reason for remand would be to eliminate dicta, and that is not a good reason to further consume judicial resources on a case that fails to state a claim. If the United States wishes to litigate the immunity issue in the Sixth Circuit, it can and should wait for a live case that truly raises the issue.

CONCLUSION

In sum, the decision below does not warrant either review or remand. The Petition should be denied.

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FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the Ninth and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

In urging this Court to deny the Writ, Respondent, State of Ohio, has continued to insist that the sixty (60) paragraph First Amended Complaint fails to state a potentially valid claim for relief under Title II of the Americans with Disabilities Act (ADA). Like the Sixth Circuit, the analysis that has been employed focuses exclusively upon whether Respondent can be held liable for the "direct discrimination" perpetrated by Defendant, Quest Recovery Services, Inc. (hereinafter "Quest"). This theory of recovery was largely obviated once Petitioners, Respondent, and Quest reached their partial settlement in the District Court. At no time in the Petition for Writ of Certiorari was it suggested that Petitioners were still attempting to hold Respondent liable for Quest's acts and omissions.

District Judge James S. Gwin had properly recognized that there are two (2) aspects to the First Amended Complaint. He explained that:

> Plaintiffs offer two core allegations. *** First, Ohio committed "direct disability discrimination" when Judge Kubilus ordered Rachel Haas to confinement in a private facility that lacked accommodations for the disabled. Second, Ohio did not meet its obligations as the owner of the property used by Quest. [citation omitted]

Petition for Writ of Certiorari, Appendix, p. 26c. The District Court concluded that the pleading failed to sufficiently detail how

Respondent could be held liable for Quest's "direct disability discrimination" under the circumstances. *Id., pp. 27c-28c.* District Judge Gwin also observed that the claim of "direct disability discrimination" centered upon Municipal Judge Kubilus' sentencing order and, as a result, was barred by absolute judicial immunity. *Id., pp. 28c-29c.*

The reason Petitioners were allowed to proceed with their Title II claim against Respondent was that the District Court had determined that the second theory of recovery was potentially viable. *Petition for Writ of Certiorari, Appendix, p. 29c.* He concluded that:

> Plaintiffs fare better on their claim regarding Ohio's obligations as the owner of the property. Plaintiffs allege that Ohio owns the Quest facility. ¶ 14. In *Johnson v. City of Saline,* 151 F.3d 564, 571 (6th Cir. 1998), the Sixth Circuit addressed the obligations of property owners under Title II and the Rehabilitation Act and held that "public entities have a duty to provide accessible facilities even when those facilities are used by contractors." As in *Johnson*, "[Ohio] definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* at 572. [emphasis added]

Petition for Writ of Certiorari, Appendix, p. 29c. The acts and omissions of Quest are completely immaterial to this alternative aspect to of the case. By the summary judgment stage of the proceedings, it was undisputed that (1) Respondent owned the building, (2) the building was being used by members of the public, and (3) the building was not handicap accessible. *Plaintiffs' Memorandum in Opposition to Defendant State of Ohio's Motion for Summary Judgment filed October 13, 2004.* Respondent remains fixated with the "direct disability discrimination" claim that was discarded long ago precisely because the State has no defense to the of violations of the duties

owed by property owners and landlords under *Johnson*, 151 F.3d 564.

In no uncertain terms, the First Amended Complaint specifically disclosed that liability was being sought against Respondent as permitted by *Johnson*, 151 F.3d 564. Paragraph 14 established that the facility "was constructed, owned, and/or maintained by the State." *Petition for Writ of Certiorari, Appendix, p. 49e.* It was further maintained in paragraph 37 that Municipal Court programs and activities were being conducted in the building. *Id., pp. 53e – 54e.* The most significant allegations were set forth in paragraph 38, but Respondent has redacted them from the "quotation" that has been furnished to this Court.[1] *Respondent's Brief, p. 6.* The deleted portion stated:

> 38. In the manner aforementioned, the Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. ***

Petition for Writ of Certiorari, Appendix, p. 54e. Respondent only provided this Court with the portion of the paragraph

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[1] Respondent appears to be following the Sixth Circuit's lead in this regard. The entire first sentence of paragraph 38 is missing from the "quotation" set forth in the opinion. *Petition for Writ of Certiorari, Appendix, p. 9a.* Significant language was also removed from the second sentence, leaving the appearance that the alleged discrimination was limited to "ordering [Plaintiff] to be confined in a privately operated system [Quest]." *Id.* The appellate court was then able to conclude from the redacted version of paragraph 38 that Plaintiffs were only claiming "direct disability discrimination" arising from a judicial order and not for violating handicap accessibility requirements as permitted by *Johnson*, 151 F.3d at 572. *Id.* No suggestion was ever made that the deleted allegations were irrelevant, conclusory, or otherwise improper. No such argument had been advanced by Respondent in the Final Brief that was served on July 7, 2005. By all appearances, the appellate court simply re-worked the First Amended Complaint in order to permit a desired result.

alleging "direct disability discrimination", which was abandoned by Petitioners long ago. When viewed in their entirety, the detailed allegations appearing in the First Amended Complaint are more than sufficient to satisfy the liberal pleading requirements imposed by *Fed. R. Civ. P. 8(a). In re NationsMart Corp. Sec. Lit.*, 130 F.3d 309, 315-316 (8th Cir. 1997); *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2nd Cir. 1972).

Respondent contends that:

> As the United States correctly asserts, the Sixth Circuit affirmed the District Court holding that Petitioner Haas failed to state a claim against the State of Ohio under Title II. [citation omitted]

Respondent's Brief, pp. 3-4. This statement is obviously incorrect. District Judge Gwin had actually ruled that the First Amended Complaint did allege a potentially viable claim for relief under Title II against the State as a landlord. *Petition for Writ of Certiorari, Appendix, p. 29c.* The Sixth Circuit appeared to disagree on the grounds that Petitioners had "not satisf[ied] our pleading requirement under *Johnson* for imposing liability on the State of Ohio." *Id., p. 9a.*

First and foremost, there was no occasion for the appellate court to impose a heightened pleading standard upon Petitioners. While Fed. R. Civ. P. 9 prescribes such burdens in certain types of cases, ADA claims are not amongst them. Petitioners were not obligated to plead legal theories or allege every minutia of their causes of action, particularly given that they had not yet completed their investigation of the matter.[2] *McDonald v.*

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[2] In conducting their fly-speck scrutiny of the First Amended Complaint, both Respondent and the Sixth Circuit neglected to consider that District Judge Gwin had ordered that all amendments to the pleadings had to be submitted by June 15, 2004, which was still early in the proceedings. *R. 23, Case Management Conference Plan/Order dated June 9, 2004.* The First Amended Complaint was filed on June 11, 2004 in accordance with this directive. At that point, Petitioners and their architectural expert, William

Household Intern., 425 F.3d 424, 427 (7th Cir. 2005); *Crull v. Gem Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

The appellate court's reference to the "requirements under *Johnson*" was apparently drawn from the portion of that opinion which "enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state." *Petition for Writ for Certiorari, Appendix, pp. 8a – 9a.* Initially, it should be observed that it was never suggested in *Johnson*, 151 F.3d 564, that these "factors" had to be specifically alleged in order to survive a motion to dismiss. More importantly, the *Johnson* Court had simply cited the factors as part of an alternative explanation for how liability could be imposed under the ADA. *Id.*, 151 F.3d at 572. The panel had already concluded that "the city definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* The four factors were relevant only to determine whether a public access cable station was also a "public entity". *Id.* Since it is beyond dispute that Respondent (State of Ohio) is a "public entity" as defined by 42 U.S.C. §12131(1) and "definitely is a landlord" pursuant to its lease agreement, there was no need for Petitioners to allege anything further under this aspect of *Johnson*.

Since Petitioners had indeed alleged a potentially viable Title II claim against Respondent, as the District Judge properly determined, the pivotal question then becomes whether Eleventh Amendment immunity is applicable. Petitioners have always agreed with Respondent that the *Johnson* claim sounds strictly in equal protection.[3] *Respondent's Sixth Circuit Final Brief, p. 21.*

Hecker, AIA, had not yet been able to conduct an inspection of the facility at issue. Shortly after they were permitted to do so by Respondent, detailed reports were issued specifically identifying numerous federal ADA accessibility requirements that had not been followed by Respondent. *Plaintiffs' Motion for Partial Summary Judgment Upon Count I, Exhibits A and B.*

[3] Respondent's reasoning strays far afield, though, with criticisms such as Petitioners' "complaint did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress' power to

The critical allegation contained in paragraph 38 of the First Amended Complaint that the: "*** State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals" forms the basis for the equal protection claim. Since a rational basis for the State's decision not to furnish handicap accessible Driver Intervention Program (DIP) facilities has never been offered, Section 1 of the Fourteenth Amendment has indeed been infringed. *Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). In accordance with the opinion that was recently issued in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 881-882, 163 L.Ed.2d 650 (2006), Section 5 plainly permits such "actual violations" to be remedied and there is no need for any inquiry into the "congruence and proportionality" of Congress' efforts to eradicate handicap discrimination prophylactically.[4] It is thus apparent that the Sixth Circuit has held that a fundamental portion of a legislative enactment is unenforceable in direct contravention of this Court's precedents.

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enforce the Fourteenth Amendment." *Respondent's Brief, p. 2.* When has any court ever held that legislative authority is dependent upon the terms employed in a pleading? Rather obviously, Petitioners did not seek relief for violations of their "constitutional right[s]" under 42 U.S.C. §1983 because it is well-settled that the Eleventh Amendment does bar such claims. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978). This immunity has been overridden for purposes of Title II of the ADA (at least in the First, Ninth, and Eleventh Circuits) and the claim of discrimination against Respondent was thus predicated strictly upon this federal statute.

[4] While Respondent has taken Petitioners to task for not mentioning the *Georgia* decision, the same can also be said of the Sixth Circuit. *Respondent's Brief, p. 7.* In urging this Court to reverse that ruling, the United States has observed that: "Although *Georgia* was decided two months before the court of appeals' decision in this case and involved a similar challenge to the operation of correctional facilities and programs, the court of appeals did not discuss or cite the case in its decision." *Brief for the United States as Intervenor, p. 8.*

The Brief for the United States as Intervenor forcefully demonstrates that the federal appellate courts are now split over whether Congress is confined to just remedying discrimination that also entails due process concerns. A number of state governments (including Ohio) can now violate the ADA while remaining secure in the knowledge that even a successful lawsuit will result in nothing more than a "cease and desist" order. See, *e.g. Klinger v. Director Dept. of Rev., State of Missouri*, 455 F.3d 888 (8th Cir. 2006) (finding the Missouri violated the ADA but prohibiting any recovery of discriminatory parking fees that had been charged). The full range of remedies that Congress included in Title II can be enforced against them only in the rare instance that the violation involves a due process claim over "right of access to courts". *Petition for Writ of Certiorari, Appendix, p. 12a.*

The Sixth Circuit's "due process only" standard was tacitly rejected a few months ago in *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006). Even though a student suffering from schizoaffective disorder had not established that he had been denied access to the courts, the First Circuit concluded that his ADA claim against a state university was viable since the congressional response to pervasive handicap discrimination in public education satisfied the "congruence and proportionality" test identified in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624. *Toledo*, 454 F.3d at 40.

Like the decisions that have been promulgated by the Ninth and Eleventh Circuits, *Toledo* is irreconcilable with the Sixth Circuit's view that states cannot be held accountable for their ADA violations under Title II so long as they allow the disabled to access the courthouses. *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004); *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005). Since Petitioners had not just alleged, but had also established during the summary judgment proceedings, that the State of Ohio also discriminates by failing to furnish handicap accessible DIP facilities, this Court should accept this opportunity

to resolve the deep rift that has developed amongst the federal appellate courts.

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order.

Respondent's "absolute judicial immunity" argument does not justify a denial of the writ that has been requested. *Respondent's Brief, pp. 4-5.* Again, District Judge Gwin applied this defense only with respect to the first theory of "direct disability discrimination". *Petition for Writ of Certiorari, Appendix, pp. 28c – 29c.* Petitioners were still allowed to proceed with not only their *Johnson* theory under Title II, but also the Rehabilitation Act claim that was settled with Respondent shortly before trial. *Id., pp. 24c – 25c & 29c.* The Sixth Circuit affirmed without intimating that the immunity extended beyond the allegations of "direct disability discrimination." *Id., pp. 6a – 7a.*

The *Johnson* claim simply is not susceptible to Respondent's contention that:

> The only direct state actor in the drama is the state municipal court judge who sentenced [petitioner] to the private rehabilitation program that allegedly discriminated against her.

Respondent's Brief, p. 1. Municipal Judge Kubulis never ordered that Plaintiff had to be confined in a non-handicap accessible facility, and he would undoubtedly be offended by any suggestion that he did so. The decision to ignore the ADA regulations applicable to owners of public buildings was made solely by officials in the Ohio Department of Alcohol and Drug Addiction Services (ODADAS). *Plaintiffs' Motion for Partial Summary Judgment Upon Count I filed August 30, 2004, pp. 3-6.* Municipal Judge Kubulis was hardly to blame for the

reprehensible conditions that Plaintiff suffered during her participation in the program and the doctrine of absolute judicial immunity has no conceivable application in this instance. None of the authorities that Respondent has cited even remotely suggest that the existence of a sentencing order, by itself, implicates absolute judicial immunity and precludes the criminal defendant from taking issue from the conditions of the confinement.

Petitioners had previously warned that "the appellate court's short-sighted ruling paves the way for the creation of special prisons for blacks, Hispanics, Arabs, and other minorities. So long as a judge has ordered the individual to be confined in a segregated facility 'absolute judicial immunity' will preclude even a constitutional claim from being filed ***." *Petition for Writ of Certiorari, pp. 18-19 (footnote omitted).* Respondent does not dispute this. As if to underscore Petitioners' point, the State has reemphasized "that absolute judicial immunity applies with undiminished force even when the judge is accused of discriminating on the basis of race in violation of 42 U.S.C. §1983 ***." *Respondent's Brief, pp. 4-5.* The parties are thus in agreement that Respondent's interpretation of the Sixth Circuit's opinion will allow unfettered governmental discrimination against anyone who happens to be subject to a valid court order. Before countless citizens are victimized, this Court should intervene and confirm that absolute judicial immunity has no application to administrative and ministerial decisions over whether buildings and facilities will be made handicap accessible. See generally *Ex parte Commonwealth of Virginia,* 100 U.S. 339, 348, 25 L.Ed. 676 (1879); *Forrester v. White,* 484 U.S. 219, 227-229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133-1135 (9th Cir. 2001).

CONCLUSION

Respondent's Brief in Opposition is devoted almost entirely to a Title II theory that was no longer pursued after the partial settlement was reached. With regard to its obligation as a building owner and landlord, the State has remained relatively silent. Petitioners have not only alleged such a claim within the parameters established by *Johnson*, 151 F.3d 564, but have also presented admissible evidence complying with *Fed.R.Civ.P. 56(e)* in support of each of the essential elements during the summary judgment proceedings. Notwithstanding Respondent's and the Sixth Circuit's inappropriate fixation with overly-technical pleading "requirements", the decisive issues in this case are whether (1) Congress is empowered to abrogate Eleventh Amendment immunity for Title II claims sounding strictly in equal protection and (2) absolute judicial immunity applies to the decisions of State officials to flout federal handicap accessibility requirements. Granting the Writ will permit this Court to resolve a split of authority amongst the Circuit Courts and rectify the alarming precedents that have been established.

Respectfully submitted,

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No. 06-263

In the Supreme Court of the United States

RACHEL HAAS, CAROL HAAS, AND RICHARD HAAS,
PETITIONERS

v.

QUEST RECOVERY SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS INTERVENOR

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QUESTION PRESENTED

The United States is seeking to intervene in this litigation, pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law. This brief accordingly addresses only the first question presented by the petition:

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to correctional programs and services.

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BRIEF FOR THE UNITED STATES AS INTERVENOR *

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the *Federal Reporter*, but is *reprinted in* 174 Fed. Appx. 265. The opinion of the district court (Pet. App. 14c-30c) is reported at 338 F. Supp. 2d 797.

JURISDICTION

The court of appeals entered its judgment on March 27, 2006. The petition for a writ of certiorari was filed on June 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

* The United States has separately filed together with this brief a motion to intervene as of right in this case, pursuant to this Court's Rule 21 and 28 U.S.C. 2403(a).

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that

> are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits, 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to suit in federal court, 42 U.S.C. 12202.

In enacting Title II, Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003). See 42 U.S.C. 12134. Title II

prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program, or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Petitioners are an individual with a disability and her parents. In 2002, petitioner Rachel Haas was struck by a truck while operating an all-terrain vehicle. Pet. App. 2a. She suffered severe injuries, including partial amputation of her left leg, receipt of a prosthetic right elbow, and implantation of a metal rod in one arm. *Ibid.* As a result of those injuries, she requires the use of a wheelchair for mobility. *Id.* at 3a. Haas subsequently pleaded guilty to operating the all-terrain vehicle while intoxicated. The municipal court sentenced Haas, *inter alia*, to complete two six-day driver intervention programs conducted by respondent Quest Recovery Ser-

vices, Inc. (Quest). Quest leased its premises from the State of Ohio. *Id.* at 2a-3a.

According to the complaint, Quest's facilities were not wheel-chair accessible and Quest staff refused to accommodate Haas's needs. Pet. App. 3a-4a. Upon arrival, she alleges that she was required to crawl with her luggage up to the sixth floor of the building because the building had no elevator and Quest staff refused to provide assistance. She also alleges that she was required to "hop, scoot, and crawl up and down the steps without any assistance" to receive meals, which were provided in the building's basement. *Id.* at 3a. On one occasion, Haas further alleges, she fell down three flights of stairs and displaced the metal rod in her arm. *Id.* at 4a. After that, Quest agreed to provide meals to Haas in her room, but then allegedly "'forgot' to deliver food on several occasions." *Ibid.* Haas also alleges that Quest's bathroom and shower facilities were inaccessible. *Id.* at 3a-4a. Finally, Haas alleges that, although her counselor gave her a favorable review, Quest's director refused to certify that she had completed the program because "her attitude had been unacceptable." *Id.* at 4a. As a result, Haas was incarcerated for six days. *Ibid.*

3. Haas and her parents filed suit against Quest and the State of Ohio, alleging violations of Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003), the United States Constitution, and state law. Pet. App. 4a, 37d-44d. Ohio filed a motion to dismiss, asserting both that it was immune from suit and that plaintiffs failed to state a claim against the State. *Id.* at 4a. The district court granted the State's motion in part, holding that the Haases had failed to state a claim against Ohio and that Congress did not validly abrogate the State's Eleventh Amend-

ment immunity for Title II claims. The court separately held that the State had waived its immunity for claims arising under the Rehabilitation Act. *Id* at 4a-5a, 14c-30c. The district court subsequently entered an order of settlement, resolving all of petitioners' claims against Quest and all of its claims against Ohio except those arising under Title II. *Id.* at 5a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court first held that petitioners had failed to state a claim against Ohio under Title II of the ADA because, under circuit precedent, petitioners "did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing." *Id.* at 9a.

The court next held that Congress lacked the power to abrogate the States' Eleventh Amendment immunity for claims under Title II. Pet. App. 9a-12a. In so holding, the court of appeals noted this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which had upheld the constitutionality of Title II's abrogation in the context of access-to-the-court claims. The court reasoned that, because petitioners did not assert an access-to-the-courts claim, *Lane* "does not provide us with guidance." Pet. App. 10a. The court then relied on its pre-*Lane* precedent, *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 537 U.S. 812 (2002), which held that Title II's abrogation was valid only for claims "sounding in due process," and was unconstitutional as applied to claims "based upon the Equal Protection Clause." Pet. App. 11a (citing *Popovich*, 276 F.3d at 812). Because petitioners' claims "implicate equal protection concerns," the Sixth Circuit held that the Eleventh Amendment barred their suit. *Ibid.*

5. At no point in the litigation did the parties or the courts below notify the Attorney General that the constitutionality of federal law had been called into question in the litigation. See Fed. R. App. P. 44(a); 28 U.S.C. 2403(a). The United States learned of this case after the petition for a writ of certiorari was filed and has now filed a motion to intervene as of right in this litigation to defend the constitutionality of federal law. See note *, *supra*.

ARGUMENT

The court of appeals has held an Act of Congress to be unconstitutional and, in so doing, has largely ignored and significantly departed from controlling precedent of this Court. Accordingly, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of *United States* v. *Georgia*, 126 S. Ct. 877 (2006), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

1. Earlier this year, but before the decision below issued, this Court unanimously held that Title II's abrogation of Eleventh Amendment immunity is constitutional to the extent that an action seeks damages for "conduct that actually violates the Fourteenth Amendment." *Georgia*, 126 S. Ct. at 882 (emphasis omitted). That decision arose, moreover, in the context of claims like petitioners' concerning inaccessible correctional facilities and damages for injuries suffered as a result of such inaccessibility. Compare *Georgia*, 126 S. Ct. at 879 (alleging inaccessible bathroom facilities and correctional programs), with Pet. App. 3a-4a (same).

Furthermore, in *Georgia*, the Court prescribed a three-step framework for addressing Eleventh Amendment claims in Title II cases. Courts must

> determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

126 S. Ct. at 882.

Although *Georgia* was decided two months before the court of appeals' decision in this case and involved a similar challenge to the operation of correctional facilities and programs, the court of appeals did not discuss or cite the case in its decision. Nor do petitioners discuss the case in their petition for a writ of certiorari. Had the court properly applied this Court's holding in *Georgia*, the court would have had no occasion to address the constitutionality of Title II's abrogation of Eleventh Amendment immunity. That is because the court of appeals first held that petitioners failed to state a claim under Title II. See Pet. App. 6a-9a (holding that petitioners did not properly plead a Title II claim against the State). Having so held, there was no reason for the court, under the three-step framework established by *Georgia*, to address the question of whether, had a claim been properly stated, Ohio would nevertheless retain its Eleventh Amendment immunity from suit.

Even if the court of appeals erred in holding that the complaint failed to state a claim against Ohio (see Pet. 14-17), the court of appeals' analysis also omitted the second step of the *Georgia* inquiry. The court did not address whether any of petitioners' claims seek relief "against the State[] for conduct that *actually* violates

the Fourteenth Amendment," 126 S. Ct. at 882, even though *Georgia* held that Title II's abrogation is constitutional in those circumstances. See *ibid.* (making that inquiry a prerequisite to addressing the constitutionality of Congress's abrogation for non-constitutional violations).

By addressing the constitutionality of an Act of Congress in advance of the necessity of doing so, the court not only failed to hew to *Georgia*'s framework, but also ignored the "'deeply rooted' commitment" and obligation of federal courts "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress and thereby undertake "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted).

As *Georgia* teaches, that principle of constitutional avoidance applies with full force to Eleventh Amendment immunity claims. *Georgia*, 126 S. Ct. at 882; see *Lane*, 541 U.S. at 530-531 & n.19; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001) (declining to address the constitutionality of Congress's enactment of Title II due to the unresolved question of whether the plaintiffs had stated a claim under Title II).

Because the court of appeals' decision has held an Act of Congress to be unconstitutional and, in so doing, has failed to apply this Court's recent and controlling precedent, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated,

and the case remanded for further consideration in light of *United States* v. *Georgia*, *supra*. See *United States* v. *Nebraska Dep't of Health & Human Servs. Finance & Support*, 126 S. Ct. 1826 (2006) (vacating and remanding for further consideration of decision holding Title II's abrogation to be unconstitutional in light of *Georgia*).

2. The court of appeals' decision should also be vacated and remanded because it failed to give effect to this Court's decision in *Tennessee* v. *Lane*, *supra*. In holding Title II's abrogation to be unconstitutional, the court of appeals relied entirely on pre-*Lane* circuit precedent, *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 537 U.S. 812 (2002), which had ruled that Title II's abrogation is valid only insofar as it applies to claims sounding in due process, and not to claims based on the Equal Protection Clause of the Fourteenth Amendment. See Pet. App. 11a (citing *Popovich*, 276 F.3d at 812). Although the court of appeals acknowledged this Court's decision in *Lane*, Pet. App. 10a, the court held that *Lane* is limited to access-to-the-court cases and "does not provide us with guidance for this case" simply because it arose in a somewhat different factual context, *ibid.*

That holding is irreconcilable with *Lane*. First, *Lane* itself arose out of the Sixth Circuit's application of *Popovich*, and this Court pointedly did not adopt that decision's categorical distinction between Title II claims rooted in due process principles and those enforcing equal protection. 541 U.S. at 515, 522-534. Moreover, this Court eschewed the *Popovich* model notwithstanding that one of the plaintiffs before the Court, Beverly Jones, raised claims that implicated only the Equal Protection Clause. *Id.* at 514 ("Jones, a certified court re-

porter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process.").

Second, the Sixth Circuit's decision in *Popovich* failed to consider whether there was a history of unconstitutional discrimination in the provision of governmental services that warranted an exercise of Congress's prophylactic powers under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. This Court held in *Lane*, however, that Congress passed Title II in response to an "extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. See *id.* at 528 (noting the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). The Court accordingly held in *Lane* that it was "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 529. Of particular relevance here, *Lane* found that the record of "unconstitutional treatment of disabled persons by state agencies" included administration of "the penal system," *id.* at 524-525, and other forms of "institutionalization," *id.* at 529 (quoting 42 U.S.C. 12101(a)(3)).

Third, this Court clarified in *Lane* that the relevant focus for examining the constitutionality of the prophylactic reach of Title II's abrogation is not the particular type of claim raised by an individual plaintiff, but rather the substantive category of governmental activities and

the cluster of constitutional rights they may implicate. See *Lane*, 541 U.S. at 531 (discussing the full range of constitutional rights involved in the administration and accessibility of judicial services, not just the particular claims raised by the two plaintiffs); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 725 (2003) (upholding the family-leave provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, as a proper exercise of Congress's Section 5 power to combat historic gender discrimination even though the complaint contained no constitutional claim of gender discrimination); see also *Hibbs*, *supra*, J.A. 6-18 (No. 01-1368). This is likely to be even more true after *Georgia*, because the validity of the prophylactic reach of the statute will generally be addressed only after determining that the claim involves a statutory, not constitutional, claim. The operative question thus is not, as the court of appeals held (Pet. App. 11a), whether these particular petitioners raised an equal protection claim rather than a due process claim, but whether Title II is proper Section 5 legislation as applied to the entire "class of cases implicating the accessibility of" correctional programs. *Lane*, 541 U.S. at 531. The Court's recent decision in *Georgia* underscored that the lens through which courts should analyze the constitutionality of Title II's abrogation is the "class of [governmental] conduct" at issue. 126 S. Ct. at 882.

Contrary to the court of appeals' conclusion (Pet. App. 10a) that *Lane* "does not provide [courts] with guidance" outside of access-to-the-court cases, this Court's holdings in *Lane* and *Georgia* concerning both the foundation for congressional legislation and the proper mode of analyzing the constitutionality of Title II's abrogation are just as binding on the Sixth Circuit

as the bottom-line judgment in *Lane*. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court]"—and, *a fortiori*, the lower courts —"are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). Indeed, the court of appeals' holding that *Lane* has no relevance outside of court-access cases conflicts with the Fourth Circuit's decision in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474 (2005). In *Constantine*, which involved Title II's application to public education, the Fourth Circuit held that *Lane*'s analysis precluded adherence to prior circuit precedent holding Title II's abrogation unconstitutional in its entirety. *Id.* at 486 n.8 (*Lane* renders the reasoning that underlay prior circuit precedent "obsolete").

The court of appeals' misapplication of *Lane* provides an additional basis to vacate the judgment below and remand for further consideration in light of this Court's decisions in *Lane* and *Georgia*. See *Klingler* v. *Director, Dep't of Revenue*, 125 S. Ct. 2899 (2005) (vacating and remanding for, *inter alia*, reconsideration in light of *Lane*, despite the court of appeals' consideration and denial of a rehearing petition based on *Lane*).

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' decision vacated, and the case remanded for further consideration in light of *United States* v. *Georgia*, 126 S. Ct. 877 (2006), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

Respectfully submitted.

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